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In The
Supreme Court of The United States
October Term 1998

DIAL SERVICE INTERNATIONAL, INC.,
DIAL SERVICE COMPANY, LTD,
and YURI KONNO,
Petitioners,
v.

CHARLES D. KIM,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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157 pp

QUESTIONS PRESENTED FOR REVIEW

Whether evidence of a discriminatory comment, unrelated to the decisional process, made by an executive without decision-making authority vis a vis the plaintiff is sufficient to establish a "mixed-motives" case of employment discrimination and thereby shift the burden of proof to the defendants.

Whether a civil litigant's abuse of the Fifth Amendment's protection against self-incrimination, by invoking the privilege during discovery, testifying as to the alleged incriminating matter at trial, and then re-invoking the privilege to prevent appropriate cross-examination, is adequately remedied by a curative instruction.

PARTIES TO PROCEEDINGS

Petitioners are Dial Service International ("DSI"), a Japanese-owned company, as well as its parent company in Japan (Dial Service Company, Ltd., or "DSC"), and the owner and Chief Executive Officer of DSI and DSC, Yuri Konno. Respondent is Charles Kim, an individual.

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OPINIONS BELOW

The Summary Order of the U.S. Court of Appeals for the Second Circuit is unpublished. Kim v. Dial Service Int'l, Inc., __ F.3d __, 1998 WL 514297 (2d Cir. June 11, 1998) (Table). The underlying opinion of the district court appealed from is likewise unpublished. Kim v. Dial Service Int'l. Inc., 1997 WL 458783 (S.D.N.Y. Aug. 11, 1997). An unappealed order of the district court granting in part and denying in part defendants' motion for summary judgment is published in an unofficial reporter. Kim v. Dial Service Int'l, Inc., 1997 WL 5902, 73 Fair Empl. Prac. Cas. (BNA) 1139 (S.D.N.Y. Jan. 8, 1997).

STATEMENT OF JURISDICTION

The Summary Order of the U.S. Court of Appeals for the Second Circuit was entered on June 12, 1998. A timely petition for rehearing with suggestion for rehearing en banc was denied by the Court of Appeals on August 5, 1998. The mandate issued on August 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1866, 42 U.S.C. § 1981 (as amended), provides as follows:

> (a) Statement of Equal Rights: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the

full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined: For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment: The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The Fifth Amendment to the U.S. Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

A. How a Federal Question was Presented

As originally pleaded, this litigation raised claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, et seq., the Civil Rights Act of 1866 ("Section 1981"), 42 U.S.C. § 1981, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, et seq., the New York State Human Rights Law ("HRL"), N.Y. Exec. Law §§ 290, et seq., and the Administrative Code of the City of New York §§ 8-101, et seq. ("Administrative Code"). In addition, a common law claim alleging breach of contract, as well as a quasi-contract claim of unjust enrichment, were added to the original complaint by amendment. Jurisdiction of the district court over the federal claims was invoked pursuant to 28 U.S.C. §§ 1331 and 1343. Supplemental jurisdiction was exercised over the state law claims on the basis of 28 U.S.C. § 1367(a).

B. Proceedings Before the District Court

This action was initiated by Charles Kim ("Kim"), a Korean-American, against his former employer, Dial Service International, Inc. ("DSI"), a small New York City-based company that provides telephone counseling services to the local Japanese community on matters ranging from child care to elder care to health care. Also named as defendants were Dial Service Company ("DSC"), DSI's parent corporation in Japan, and Yuri Konno ("Konno"), a Japanese national and the founder, sole owner, and Chief Executive Officer of DSI and DSC.

Kim was employed by the Japanese-owned DSI for 6 ½ years after being hired by Konno in 1989. He alleged that, beginning with his promotion by Konno in 1990, he was underpaid and eventually terminated from his employment by Konno in 1995 on the basis of his age, Korean race and Korean national origin. Kim's Title VII and ADEA claims were dismissed on summary judgment. A jury trial was conducted from May 27 to June 5, 1997, with respect to Kim's claims alleging (1) race discrimination under Section 1981, the HRL, and the Administrative Code; (2) national original discrimination under the HRL and the Administrative Code; (3) age discrimination under the HRL and the Administrative Code; and (4) breach of contract and quasi-contract.

At trial, Kim introduced, over defendants' objection, a highly inflammatory memorandum prepared by Shohei Ito, a member of DSC's management team in Japan and one of Konno's close advisors. The memorandum was prepared three years prior to Kim's dismissal and bore no relationship whatsoever either to Kim or to DSI's employment policies or practices. Rather, Ito was weighing in on a debate raging at the time concerning a proposed purchase of real estate in Fort Lee, New Jersey in connection with a possible relocation of DSI's offices. In that context, Ito, who had no responsibility for any of the employment decisions challenged by Kim as discriminatory, commented:

> I would like to present pertinent information and my own opinion regarding this project.

- Formerly Fort Lee was an exclusive residential area where many Japanese and Jewish people lived. Recently, however, Arabians and Koreans have started to move into this neighborhood. Blacks are also taking up their residence there. As a result, troubles are emerging in the area security.
- In this proposal, the average housing price fluctuates between $690,000 to $830,000. Under the current stagnated ecohomic conditions, these prices for the houses that were priced $500,000 to $600,000 a year or two ago seem too steep.
- In my opinion, our company cannot bear the financial risk in case the sales should be delayed after inputting funds totaling seven million dollars, estimating the lot price at two million dollars and the initial construction cost at five million dollars.
- If such a project is quite feasible, I recommend participating in a local American investor's development planning as the most desirable alternative. Unless we can rely on the local American's (Anglo Saxon is desirable) confidence, I suggest we forgo any investment into real estate development.

(Signed)

Ito

- After purchasing this property, construction fees become necessary. Please present your financial plan. Also, please determine the funding method for this plan.
- I suggest you visit Mr. Yoda, manager of the Sanwa Bank New York Branch to discuss this matter including a request for recommendation of a financial institution who may make a loan.

Admission of the Ito memorandum was one of several hotly contested evidentiary matters that the trial court was called upon to resolve. Another issue that surfaced during Kim's testimony injected a constitutional dimension into this civil case. The evidence introduced at trial established that during the last four years of his employment Kim was the only DSI employee in New York authorized to write checks from the corporate account. During the course of litigation DSI unearthed from its files no fewer than sixteen DSI checks payable to third parties, including corporate entities and Kim's hand-picked DSI accountant, Bae Lee, with forged endorsements that were cashed at Kim's personal bank in New Jersey. Kim was questioned about these checks at his deposition but he repeatedly invoked his Fifth Amendment privilege against self-incrimination and refused to answer.

At trial, however, Kim affirmatively introduced the subject of these suspiciously endorsed checks on direct examination. Over the objection of defendants' counsel, Kim proceeded to explain to the jury that the practice of

"converting the checks to cash and depositing the cash into the cash account" was known to, and approved by, DSI management and Konno. Because neither this nor any other explanation of the check endorsements was offered by Kim at his deposition, in that he took the Fifth Amendment and refused to be examined on the matter, defendants' counsel immediately and specifically objected to Kim's trial testimony. That objection was overruled. Nevertheless, when defendants attempted to cross-examine Kim about the checks he had endorsed and deposited at his personal bank, he again invoked his Fifth Amendment privilege seven times, refusing to answer a series of questions designed to establish that Kim engaged in improprieties supportive of an "after-acquired evidence" defense against his claims. As a result, the jury was left to ponder only Kim's side of the story as related by Kim while he was on the stand -- that he had converted the checks and deposited the cash into DSI's cash account with full knowledge and acquiescence of DSI's management -- but never heard Kim respond to the evidence indicating that he fraudulently endorsed the checks and deposited them into his own account. The district judge made a hollow attempt to minimize the impact of Kim's selective invocation of the Fifth Amendment by instructing the jury that it could draw an adverse inference from Kim's refusal to testify, but the damage was already done.

Following the close of evidence, the district court charged the jury on the legal principles governing their deliberations. As it turns out, the district court's jury charge

was a confusing conflagration of the "pretext" and "mixed-motives" theories of employment discrimination. The jury was instructed to conduct a three-part analysis: first, to consider whether defendants' explanations for its actions were pretextual; second, to determine whether Kim had proved that his race was "a motivating factor" in the challenged employment decisions; and, third, if the jury found that race was "a motivating factor" but that defendants' explanations were not pretextual, to consider whether defendants would have made the same decisions even had they not considered Kim's race.

Based on these instructions, the jury returned a verdict in favor of Kim on his race discrimination claims. The jury also found for Kim on his state law breach of contract and unjust enrichment claims. Kim's age and national origin discrimination claims were rejected by the jury. The jury's damage award exceeded $1.5 million, although that figure was subsequently reduced by the district judge. In addition, the district court entered judgment as a matter of law in defendants' favor on the state law claims. The jury's verdict with respect to the race discrimination claim survived defendants' post-trial motion for judgment as a matter of law.

C. Proceedings Before the Court of Appeals

On appeal, defendants raised a host of challenges to the proceedings before the district court. Among them was an attack on the district court's instruction as to the law governing Kim's race discrimination claim. Defendants argued that the jury charge was erroneous and prejudicial in

two respects: (1) the jury was instructed as to the employer's burden of proof in a "mixed-motives" case despite the fact that the predicate for such an instruction, namely "direct evidence" of discrimination, had not been laid; and (2) the district court understated the burden of proof imposed on a plaintiff in a "pretext" case by directing the jury to find for Kim if it concluded his race was "a motivating factor" behind the challenged employment actions. The Court of Appeals agreed with defendants that the district court's jury charge enunciated a "mixed-motives" analysis, but held, without meaningful discussion, that such an instruction was warranted because the Ito memorandum sufficed to shift the burden of proof to defendants.

Defendants' further contention on appeal that the district court's surgical application of the Fifth Amendment was erroneous and prejudicial failed to adduce any analysis by the Court of Appeals at all. Presumably, consideration of this important constitutional issue was subsumed within the Court of Appeals' summary conclusion that: "We have considered all of defendants' other arguments, and find them to be without merit."

REASONS FOR GRANTING THE WRIT

A. This Court's Plurality Opinion in Price Waterhouse v. Hopkins, Adopting a "Mixed Motives" Model to Employment Discrimination Litigation, Has Caused Significant Confusion and Spawned Divisive Precedent

This Court's sharply divided decision in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) signaled a sea change in the litigation of employment discrimination cases. Previously, individual disparate treatment cases initiated under federal discrimination statutes, such as Title VII, the ADEA, and Section 1981, inevitably followed a three-step burden shifting analytical scheme throughout which the plaintiff bore the ultimate burden of proof. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In Price Waterhouse, however, the Court, in a plurality opinion, ruled that certain employment discrimination cases are properly governed by a "mixed-motives" method of analysis: "We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." 490 U.S. at 258, 109 S. Ct. at 1795 (Brennan, J.).

In a prescient opening to his dissenting opinion in Price Waterhouse, Justice Kennedy posited that: "Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in McDonnell Douglas Corp. v. Green, 411 U.S.

792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar, and so I must dissent." Price Waterhouse, 490 U.S. at 279, 109 S. Ct. at 1806 (Kennedy, J., dissenting). Confusion and disarray has, as Justice Kennedy and his dissenting colleagues, Chief Justice Rehnquist and Justice Scalia, predicted, indeed proved to be Price Waterhouse's legacy. See generally, Note, A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims, 61 Alb. L. Rev. 627, 648-57 (1997) (hereafter "A Call For Price Waterhouse II"); Note, Do As She Does, Not As She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in Price Waterhouse v. Hopkins, 17 Berkeley J. Employment & Lab. L. 332, 354-64 (1996) (hereafter "Do As She Does, Not As She Says"). This petition presents the Court with a unique opportunity to define and delimit the "mixed-motives" model, as it applies to employment discrimination cases, and thereby clarify an area of the law that for nearly a decade now has been rife with inter-circuit, and even intra-circuit, dissension and inconsistency.

Employment discrimination litigants now frequently expend significant resources quibbling over whether a particular disparate treatment case is properly characterized as involving "mixed-motives," so as to come within the Price

Waterhouse paradigm, or, alternatively, falls under the classic "pretext" model. The reason such battles are waged transcends lawyerly instincts to engage in academic debate: "Making the distinction between mixed-motive and pretext cases is critical, because plaintiffs enjoy more favorable standards of liability in mixed-motive cases." Halperin v. Abacus Technology Corp., 128 F.3d 191, 202 n.16 (4th Cir. 1997) (citations and internal quotations omitted). "Mixed-motives" cases generally require the fact finder to resolve two issues: first, whether the plaintiff has proved that an impermissible reason was one of the motivations for the adverse employment decision and, if so, second, whether the defendant has proven that it would have taken the same action for a permissible, nondiscriminatory reason. Price Waterhouse, 490 U.S. at 258, 109 S. Ct. at 1795. "Pretext" cases, by contrast, ultimately raise the single issue of whether the plaintiff has sustained his burden of proving that the challenged employment decision was actually rooted in unlawful discrimination, as opposed to the reason advanced by the employer. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-12, 113 S. Ct. 2742, 2749-50, 125 L. Ed. 2d 407 (1993). Thus, in "pretext" cases, "the district court must decide which party's explanation of the employer's motivation it believes. It is not enough, in other words, to dis believe the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." Id., 509 U.S. at 519, 113 S. Ct. at 2754 (emphasis in original) (citations and internal quotations omitted).

Many times, as in the case sub judice, deliberation about whether a particular action involves a "mixed-motives" or "pretext" claim centers on the jury instructions. See, e.g., Carey v. Mt. Desert Island Hospital, 156 F.3d 31 (1st Cir. 1998); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 512-16 (3d Cir. 1997), cert. denied, ___ U.S. ___ 118 S. Ct. 1516, 140 L. Ed. 2d 669 (1998); Fields v. New York State Office of Mental Retardation and Developmental Disabilities, 115 F.3d 116, 121-23 (2d Cir. 1997); Thomas v. Denny's Inc., 111 F.3d 1506, 1511-12 (10th Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 626, 139 L. Ed. 2d 607 (1997). Perhaps ironically, although Price Waterhouse creates what can be fairly described as an affirmative defense to a claim of employment discrimination,[1] often times, as here, the plaintiff employee is the party proposing a "mixed-motives" instruction to which the defendant employer objects. The Second Circuit has cogently explained why this is so:

> Usually, it is the defendant who wants the jury instructed on an affirmative "dual motivation" defense. Yet some defendants prefer not to have such an instruction. They would apparently prefer to stand or fall on the issue of whether the plaintiff has proved that

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[1] Price Waterhouse, 490 U.S. at 246, 109 S. Ct. at 1788 ("[T]he employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and the employer, if it wishes to prevail, must persuade it on another.").

> discrimination was a motivating factor, rather than add an affirmative defense of what the defendant would have done in the absence of discrimination. Perhaps they fear that if the jury is correctly told that the employer bears the burden of persuasion on the affirmative defense, the jury might mistakenly dilute the plaintiff's burden to prove discrimination, or even become confused and mistakenly think that the employer must prove that it did not discriminate. Avoiding all mention of a defendant's burden of proof might seem to some defendants to avoid these risks.

Fields, 115 F.3d at 122. See also Ostrowski v. Atlantic Mutual Ins. Cos., 968 F.2d 171, 181 (2d Cir. 1992) ("[F]or tactical reasons, it is often the plaintiff who asks for a Price Waterhouse instruction, for when requests to charge are submitted, the employer may well choose to avoid the burden-shifting language in the Price Waterhouse charge, hoping that the jury either will not find a forbidden animus or will believe the burden is on the plaintiff in the case of a mixed-motive.")

When called upon to categorize a disparate treatment claim of employment discrimination, be it in the context of crafting a carefully tailored jury charge or otherwise, federal courts have invariably looked to Justice O'Connor's concurring opinion in Price Waterhouse for guidance. See, e.g., Thomas v. National Football League Players Ass'n., 131

F.3d 198, 203-05 (D.C. Cir. 1997); Kneibert v. Thomson Newspapers, Michigan Inc., 129 F.3d 444, 456-53 (8th Cir. 1997); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997), cert. denied, __ U.S. __, 118 S. Ct. 1516, 140 L. Ed. 2d 669 (1998); Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995); Haynes v. W.C. Caye & Co., Inc., 52 F.3d 928, 930-31 (11th Cir. 1995); Betkerur v. Aultman Hospital Ass'n., 78 F.3d 1079, 1096-97 (6th Cir. 1996). This is so despite judicial recognition "that Justice O'Connor's concurrence was one of six votes supporting the Court's judgment (four Justices comprised the plurality, and Justice White filed a separate concurrence), so that it is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as established binding precedent." Thomas, 131 F.3d at 203.

In her concurrence, Justice O'Connor explained that: "Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made 'because of' the plaintiff's protected status." Price Waterhouse, 490 U.S. at 278, 109 S. Ct. at 1805 (O'Connor, J., concurring in the judgment). Reasoning by negative deduction, Justice O'Connor defined the requisite "direct evidence" of discrimination necessary to shift the burden of proof to the defendant principally by what it is not: "Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the

employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard." Id., 490 U.S. at 277, 109 S. Ct. at 1804-05 (citation omitted). Beyond that, Justice O'Connor spoke in generalities: "What is required is . . . direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." Id., 490 U.S. at 277, 109 S. Ct. at 1805.

Justice O'Connor's analysis left much for interpretation, particularly as to the meaning of the term "direct evidence." As one commentator recently observed: "Although Justice O'Connor's opinion gives clues as to what evidence would be sufficient for a court to shift the burden of persuasion to the defendant, she did not provide the lower courts with clear guidance. Lower courts reading her concurrence find two guiding principles that are of only limited help. First, that pure statistical proof, stray remarks, statements by nondecisionmakers and statements unrelated to the decisionmaking process will not suffice to shift the burden. Second, that proof of sexist remarks made by decisionmakers in the decisionmaking process itself, such as what Hopkins presented [in the Price Waterhouse case], will suffice." Do As She Does, Not As She Says, 17 Berkeley J. Employment & Lab. L. at 353-54. See also A Call for Price Waterhouse II, 61 Alb. L. Rev. at 648 ("Unfortunately, because Justice O'Connor was not precise about the meaning

of her direct evidence requirement, the lower courts have been mired in confusion and inconsistency in their attempts to ascertain the level of proof a plaintiff must present before the burden shifts to the defendant in a mixed-motive employment discrimination case.") (footnote omitted); Note, Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins, 46 Stan. L. Rev. 959, 969 (1994) (hereafter "Despite the Smoke") ("Despite Price Waterhouse's promise, a blend of judicial confusion and conservatism has narrowed the doctrine's applicability for victims of employment discrimination.").

Federal courts have made this same basic observation. Speaking candidly, the Third Circuit, sitting in banc, recently noted in an age discrimination case that "[t]he precise meaning of Justice O'Connor's term 'direct evidence' has divided the courts." Keller v. Orix Alliance, Inc., 130 F.3d 1101, 1113 (3d Cir. 1997) (in banc). Indeed, when it comes to applying Price Waterhouse, and more particularly construing Justice O'Connor's reference to "direct evidence," the circuit courts are hopelessly disconnected. See A Call For Price Waterhouse II, 61 Alb. L. Rev. at 649-57 (identifying two approaches employed by the circuits in categorizing employment discrimination claims, but noting that certain circuit courts have wavered on the subject); Do As She Does, Not As She Says, 17 Berkeley J. Employment & Lab. L. at 354-64 (dividing courts of appeal into three categories for purposes of analyzing judicial construction of Justice

O'Connor's analysis in Price Waterhouse); Despite the Smoke, 46 Stan. L. Rev. at 970 (observing at least four different applications of Price Waterhouse among the circuits). Surveying the legal landscape recently, the District of Columbia Circuit identified no less than three readings of Justice O'Connor's concurrence in Price Waterhouse: "A number of other circuits have concluded . . . that there is no bar on using circumstantial or inferential evidence to shift the burden of persuasion under Price Waterhouse. Some have understood 'direct' evidence as a requirement of Price Waterhouse, and have remained silent as to the precise meaning of the term, never expressly construing it as the opposite of circumstantial or inferential evidence. Several circuits have both taken Justice O'Connor's concurrence as the rule of Price Waterhouse and have interpreted 'direct' to mean non-inferential or non-circumstantial." Thomas v. National Football League Player's Ass'n., 131 F.3d 198, 205 (D.C. Cir. 1997) (citations omitted).

As "mixed-motives" jurisprudence continues to develop, the divide between the circuits has widened. A sharp distinction now exists that simply cannot be discarded as necessarily rooted in the vagaries of individual employment discrimination cases. Even casting a broad net in categorizing the case law reveals a minimum of three diametrically opposed judicial points of view. The First, Fifth, Sixth, Tenth, and Eleventh Circuits have adopted an exacting direct evidence standard and will apply the Price Waterhouse "mixed-motives" method of analysis only where

the plaintiff has introduced compelling non-circumstantial evidence proving that the employment action at issue was tainted by a discriminatory motive.[2] By contrast, the Second, Third, Fourth, and District of Columbia Circuits subscribe to a somewhat more liberal construction of Price Waterhouse, generally finding that circumstantial or inferential evidence of discrimination is sufficient to shift the burden of proof to the defendant so long as there exists some link between the indicia of a discriminatory attitude and the employment action

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[2] See, e.g., Jackson v. Harvard University, 900 F.2d 464, 467 (1st Cir.) ("Direct evidence is evidence which, in and of itself, shows a discriminatory animus"), cert. denied, 498 U.S. 848, 111 S. Ct. 137, 112 L. Ed. 2d 104 (1990); Mooney v. Aramco Services Co., 54 F.3d 1207, 1218-19 (5th Cir. 1995) (although age-based comments supported an inference of discrimination, "mixed-motives" instruction was unwarranted because "[t]here is no evidence that Appellee 'actually relied on' Trial Plaintiffs' age in making the decision. While we could infer such a conclusion from these statements, we cannot say that they provide 'direct evidence' of age related animus.") (footnote omitted); Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1081 (6th Cir. 1994) (evidence from which it is necessary to draw inferences of discriminatory animus does not qualify as direct evidence); EEOC v. Wiltel, Inc., 81 F.3d 1508, 1514 (10th Cir. 1996) ("[S]tatements requir[ing] the trier of fact to infer that discrimination was a motivating cause of an employment decision . . . are at most circumstantial evidence of discriminatory intent.") (citations omitted); Burrell v. Board of Trustees of Georgia Military College, 125 F.3d 1390, 1393-94 (11th Cir. 1997) ("Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.' Here, we cannot say that Baggerly's statement [that he wished to hire a man for a particular position] -- even if fully credited -- proves the existence of a discriminatory motive in his decision to terminate plaintiff's employment; at best, the evidence suggests -- but does not prove -- a discriminatory motive. 'By definition, then, it is circumstantial evidence.' ") (citations and footnotes omitted).

alleged to be unlawful.[3] The Seventh and Eighth Circuits are even less demanding; in those circuits generalized evidence of discriminatory animus is seemingly enough to activate a Price Waterhouse burden shift.[4]

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[3] See, e.g., Ostrowski v. Atlantic Mutual Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) ("If . . . the plaintiff's nonstatistical evidence is directly tied to the forbidden animus, for example policy documents or statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus of the type complained of in the suit, that plaintiff is entitled to a burden-shifting instruction."); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997) ("[C]ertain circumstantial evidence is sufficient for a mixed-motives instruction, if that evidence can fairly be said to directly reflect the alleged unlawful basis for the adverse employment decision.") (citation and internal quotations omitted), cert. denied, ___ U.S. ___, 118 S. Ct. 1516, 140 L. Ed. 2d 669 (1998); Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995) ("What is required [to earn a mixed-motives jury charge] is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.") (citations omitted); Thomas v. National Football League Player's Assn., 131 F.3d 198, 205 (D.C. Cir. 1997) ("A number of other circuits have concluded, correctly in our view, that there is no bar on using circumstantial or inferential evidence to shift the burden of persuasion under Price Waterhouse.") (citations omitted).

[4] See, e.g., Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997) ("[R]emarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality."); Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 635 (8th Cir. 1998) (finding that use of racial slur by decision maker "in the context of [plaintiff's] employment warrants an inference of discriminatory attitude sufficient to permit the factfinder to conclude that race was a motivating factor in the decision to terminate [plaintiff].")

Price Waterhouse has therefore clearly spawned a glaring and untenable conflict among the circuit courts. A clear line divides those circuits that have construed Justice O'Connor's reference to "direct evidence" in the traditional sense, so as to require that plaintiffs introduce evidence proving the existence of discrimination without inference or presumption before permitting the burden of proof to shift to the defendants, and those circuits requiring something less: specifically, evidence that is "direct" in its temporal or contextual relation to the challenged employment decision, or at least to the plaintiff, if not necessarily a "direct" reflection of the underlying motive for the decision at issue. See generally, Do As She Does, Not As She Says, 17 Berkeley J. Employment & Lab. L. at 356-62.

Even individual circuits do not appear to speak with a single voice in defining the scope of the "mixed-motives" theory of employment discrimination. This particular case offers a stark illustration of the point. The Second Circuit has admonished that: "Evidence potentially warranting a Price Waterhouse burden shift includes, inter alia, policy documents and evidence of statements or actions by decisionmakers 'that may be viewed as directly reflecting the alleged discriminatory attitude.' In short, to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment." Raskin v. Wyatt Co., 125 F.3d 55, 60-61 (2d Cir. 1997) (emphasis in original), citing Fields, 115 F.3d at 124; Lightfoot v. Union Carbide

Corp., 110 F.3d 898, 913 (2d Cir. 1997); and Ostrowski, 968 F.2d at 182. Plainly, the Court of Appeals' finding that the Ito memorandum constituted "direct evidence" of discrimination sufficient to justify a Price Waterhouse burden-shifting instruction cannot be squared with existing Second Circuit precedent. The Ito memorandum was prepared three years prior to Kim's dismissal by a non-decisionmaker and concerned a prospective relocation of DSI's offices and an attendant purchase of real estate. There is no immediate, or for that matter tenuous, relationship between the Ito memorandum and any of the employment decisions that form the basis of Kim's discrimination claims. Evidence of this sort has never before impressed the Second Circuit as creating a "mixed-motives" situation,[5] yet here the burden-shifting jury instruction somehow met with the Court

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[5] See, e.g., Raskin, 125 F.3d at 62-63 (evidence that plaintiff's eligibility for early retirement came up in a conversation about his qualifications for, and interest in, an office manager position held insufficient to establish "mixed-motives" case); Fields, 115 F.3d at 124 (racial slurs by colleagues not involved in decision making process do not trigger "mixed-motives" analysis); de la Cruz v. New York City Human Resources Administration Dept. of Social Services, 82 F.3d 16, 23 (2d Cir. 1996) (comment to plaintiff that his problems were "cultural," and that he and his new Hispanic supervisor "will understand each other better" held inadequate to prove the existence of an impermissible motive); Hargett v. National Westminster Bank, USA, 78 F.3d 836, 840 (2d Cir.) (alleged discriminatory remark by non-decisionmaker insufficient to prove "mixed-motives"), cert. denied, ___ U.S. ___, 117 S. Ct. 84, 136 L. Ed. 2d 41 (1996).

of Appeals' approval.[6]

Aside from the irreconcilable conflict with its own precedent, the decision of the Second Circuit in this case runs directly counter to the Third Circuit's recent opinion in Walden v. Georgia-Pacific Corp., 126 F.3d 506 (3d Cir. 1997).[7] The two cases present fact patterns that are, in pertinent respects, identical. In Walden, a retaliation case, the plaintiffs argued that a damning (to the defendant) memorandum received by the decision maker, but not prepared by him, was sufficient to prove the existence of an impermissible motive and shift the burden of proof under

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[6] It has been recognized that a defendant in an employment discrimination case is necessarily prejudiced when a "mixed-motives" charge is erroneously given to the jury despite the plaintiff's failure to adduce "direct evidence" of discrimination. Woodson v. Scott Paper Co., 109 F.3d 913, 933-35 (3d Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 299, 139 L. Ed. 2d 230 (1997). See also Carey v. Mt. Desert Island Hospital, 156 F.3d 31 (1st Cir. 1998) (Stahl, J., dissenting) (agreeing with majority opinion that defendant was "unquestionably prejudiced" by charge to jury on "mixed-motives" standard). Cf. Ostrowski v. Atlantic Mutual Ins. Cos., 968 F.2d 171, 184-86 (2d Cir. 1992) (reversing jury verdict in favor of employer upon finding that district court failed to give a "mixed-motives" instruction despite plaintiff's introduction of "direct evidence" of discrimination).

[7] As noted above, the Third Circuit adheres to the same basic construction of Justice O'Connor's "direct evidence" requirement that the Second Circuit professes to honor. Indeed, the Third Circuit looked to Second Circuit precedent in formulating a definition of "direct evidence" under Price Waterhouse. Hook v. Ernst & Young, 28 F.3d 366, 373-76 (3d Cir. 1994).

Price Waterhouse. The Third Circuit rejected this contention, reasoning that the memorandum "was written more than six months before the plaintiffs were fired, and there is no evidence linking [the author] to the February 1992 decision to fire the plaintiffs. Even though [the decision maker] presumably received a copy of the memo, the fact that a decision maker received a memorandum containing a statement that allegedly reflects retaliatory animus does not show that the decisionmaker shared that retaliatory animus." Id., 126 F.3d at 516. The Second Circuit, by sharp contrast, ruled that Konno's receipt of the outdated Ito memorandum, coupled with the fact that Ito was an advisor to Konno, was sufficient to impute Ito's alleged discriminatory animus to Konno and thereby prove the existence of "mixed-motives."

The inherent tension between the Court of Appeals' curious decision in this case and precedent from within and outside the Second Circuit is emblematic of the "disarray in an area of the law already difficult for the bench and bar" that Justice Kennedy prophetically surmised would flow from this Court's plurality opinion in Price Waterhouse, 490 U.S. at 279, 109 S. Ct. at 1806 (Kennedy, J., dissenting). Lower courts have been struggling to interpret and apply Price Waterhouse for nearly a decade. What has emerged is a body of decisional law that has confounded district judges and employment law practitioners alike, and has prompted multiple pleas for further guidance from this Court. See, e.g., A Call for Price Waterhouse II, 61 Alb. L. Rev. at 664-69; Do As She Does, Not As She Says, 17 Berkeley J. Employment

& Lab. L. at 364-69. This important aspect of employment discrimination jurisprudence cries out for clarification. Petitioners respectfully urge the Court to issue a writ of certiorari, reverse the Second Circuit's Summary Order, and in so doing fully and finally establish a workable rule of law defining and delimiting the scope and applicability of the "mixed-motives" principles articulated, but not fully framed, in Price Waterhouse.

B. Judicial Treatment of the Fifth Amendment Privilege Against Self-Incrimination in Civil Litigation Has Been Inconsistent Thereby Requiring Guidance from the Supreme Court

It is a bedrock principle of constitutional law that "[t]he Fifth Amendment protects against compelled self-incrimination." Ohio Adult Parole Authority v. Woodard, ___ U.S. ____, 118 S. Ct. 1244, 1252, 140 L. Ed. 2d 387 (1998) (citation omitted). Although textually the Fifth Amendment declares only that "[n]o person ... shall be compelled in any criminal case to be a witness against himself ...," it is well settled that the privilege against self-incrimination "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L. Ed. 2d

274 (1973). The question raised by this petition, therefore, is not whether the Fifth Amendment privilege against self-incrimination attaches to civil proceedings -- clearly it does -- but rather how the privilege is to be applied in the civil litigation context. Although that topic has been the subject of much commentary,[8] Supreme Court guidance is seriously lacking and sorely needed.

Unlike the rule in criminal cases, reliance on the Fifth Amendment in civil cases may carry some disadvantages for the party seeking its protection. See Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558, 47 L. Ed. 2d 810 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'") (citation omitted). "[T]he complications that may arise in civil

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[8] See, e.g., Fendler, Waive the Fifth or Lose the Case: Total Preclusion Orders and the Civil Defendant's Dilemma, 39 Syracuse L. Rev. 1161 (1988); Heidt, The Conjurer's Circle – The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062 (1982); Comment, Plaintiff as Deponent: Invoking the Fifth Amendment, 48 U. Chi. L. Rev. 158 (1981); Note, Constitutional Law: Self-Incrimination and Court Granted Immunity in Civil Litigation, 27 Okla. L. Rev. 243 (1974); Kaminsky, Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis, 39 Brooklyn L. Rev. 14 (1972); Donnicci, The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues, 3 U.S.F. L. Rev. (1968); Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 Va. L. Rev. 322 (1966).

litigation may be divided into two categories -- the consequences of the privilege when properly invoked, and the effects when it is abused causing unfair prejudice to the opposing litigant." Securities and Exchange Comm. v. Graystone Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994).

Kim's invocation of the Fifth Amendment was unfair, prejudicial and abusive on two levels: first, Kim, with the district court's acquiescence, sandbagged defendants by testifying at trial concerning the very check endorsements he refused, on Fifth Amendment grounds, to be questioned about at deposition; second, after explaining certain of the endorsements on direct examination (and in so doing pointing an accusatory finger at defendants as the true perpetrators of the fraud and tax evaders at that), Kim reversed field yet again, invoking the Fifth Amendment on cross-examination and thereby defeating defendants' efforts to undermine his credibility and perhaps establish an "after-acquired evidence" defense to Kim's claims. See McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 360-63, 115 S. Ct. 879, 886-87, 130 L. Ed. 2d 852 (1995).

Thus, Kim initially placed defendants at a distinct disadvantage by denying them discovery on a subject he turned around and affirmatively raised (albeit in a defensive posture) at trial:

> In a civil trial, a party's invocation of the privilege may be proper, but it does not take place in a vacuum; the rights of the other litigant are entitled to consideration as well.

> One of the situations in which that concern comes into play arises when one party invokes the Fifth Amendment during discovery, but on the eve of trial changes his mind and decides to waive the privilege. At that stage, the adverse party -- having conducted discovery without the benefit of knowing the content of the privileged matter -- would be placed at a disadvantage. The opportunity to combat the newly available testimony might no longer exist, a new investigation could be required, and orderly trial preparation could be disrupted. In such circumstances the belated waiver of the privilege could be unfair.

Graystone Nash, 25 F.3d at 191.

Kim only compounded matters by sheathing his sword following direct examination and raising his shield to prevent cross-examination. His testimony on direct plainly operated to waive any right he had under the Fifth Amendment to skirt further inquiry by defendants on the subject of the fraudulently endorsed checks. "[A] witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth

Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell." Brown v. United States, 356 U.S. 148, 155-56, 78 S. Ct. 622, 627, 2 L. Ed. 2d 589 (1958). "Hence, [Kim] could claim no valid Fifth Amendment privilege to refuse to answer the questions posed to him during cross-examination." United States v. Panza, 612 F.2d 432, 437 (9th Cir. 1979), cert. denied, 447 U.S. 925, 100 S. Ct. 3019, 65 L. Ed. 2d 1118 (1980).

Clearly, therefore, Kim's invocation of the Fifth Amendment at trial was unwarranted and inappropriate. The question remains, however, as to the proper corrective measure to employ as a means of remedying Kim's misuse of the privilege against self-incrimination. The district judge deemed no remedy appropriate for Kim's abusive tactic of hiding behind the cloak of the Fifth Amendment at his deposition by refusing to answer questions posed regarding the fraudulently endorsed checks, only to emerge with exculpatory testimony on the point during his direct examination at trial. In the face of Kim's resurrection of the privilege on cross-examination, the district judge -- deluded by "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury [which] all practicing lawyers know to be unmitigated fiction," Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 2d 790 (1949) -- simply charged the jury that Kim's refusal to answer defendants' questions could be held against him. The Court of Appeals approved the district court's

forgiving approach sub silentio.

Other circuit courts, recognizing that "a curative instruction is not tantamount to deletion of prejudice," United States v. One Parcel of Real Estate, 963 F.2d 1496, 1502 (11th Cir. 1992), have taken an entirely different, far more forceful, stand against abusive civil litigation tactics of the sort successfully employed by Kim. For instance, in a strikingly similar case, the First Circuit Court of Appeals affirmed the outright dismissal of a retaliatory discharge action in response to the plaintiff's invocation of the Fifth Amendment during discovery to preclude inquiry pertaining to certain questionable business arrangements. Serafino v. Hasbro, Inc., 82 F.3d 515 (1st Cir. 1996). The circuit court reasoned that the evidence withheld on privilege grounds "was crucial to defendants' ability to mount an effective [after-acquired evidence] defense, and was uniquely within plaintiff's control." Id. at 518-19. In another civil case, the First Circuit affirmed an order precluding the defendant from testifying because he had earlier refused to answer questions during discovery, this time explaining that: "A defendant may not use the fifth amendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial." Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 577 (1st Cir. 1989). Even the Second Circuit has observed that "if the witness's assertion of the privilege 'precludes inquiry into details of his direct testimony' so that 'the defense is deprived of the right to test the truth of his direct testimony,' ... the

court [must] strike it." United States v. Brooks, 82 F.3d 50, 54 (2d Cir.) (citation omitted), cert. denied, ___ U.S. ___, 117 S. Ct. 267, 136 L. Ed. 2d 191 (1996). See also United States v. McNeely, 69 F.3d 1067, 1074-76 (10th Cir. 1995) (striking witness' testimony where effective cross-examination was obstructed); Lawson v. Murray, 837 F.2d 653, 656 (4th Cir.) (striking testimony of defense witness who provided exculpatory testimony on direct examination but invoked the Fifth Amendment on cross-examination), cert. denied, 488 U.S. 831, 109 S. Ct. 87, 102 L. Ed. 2d 63 (1988); United States v. Baker, 721 F.2d 647, 649 (8th Cir. 1983) (defendant's testimony disregarded based on invocation of Fifth Amendment during cross-examination). Still other circuits have approved narrower preclusion orders to remedy a litigant's unfair or improper reliance on the Fifth Amendment. See, e.g., Traficant v. Commissioner of Internal Revenue, 884 F.2d 258, 265 (6th Cir. 1989) (barring defendant from introducing evidence on the authenticity of his own statements and tape recordings because he had invoked the Fifth Amendment and refused to respond to discovery on these points).

As the foregoing cases illustrate, the circuit courts are by no means uniform in their approach to the constitutional conundrum that surfaces whenever a civil litigant erects a Fifth Amendment barrier in order to curtail the otherwise broad scope of discovery contemplated by the Federal Rules of Civil Procedure, or to deprive an adversary of a full and fair opportunity to cross-examine at trial. Remedies for abuse

of the privilege are varied and inconsistent. Alternative theories abound. See Heidt, The Conjurer's Circle – The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1087-1134 (1982). None, however, have been formally endorsed by this Court. Issuance of a writ of certiorari will enable the Court to consider and define the contours of the Fifth Amendment privilege against self-incrimination as it applies in the civil arena, and correct the erroneous evidentiary ruling in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari to the Second Circuit Court of Appeals should issue and the questions presented for review given plenary consideration.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12 day of June, one thousand nine hundred and ninety-eight.

PRESENT:

JAMES L. OAKES,
THOMAS J. MESKILL,
JOSE A. CABRANES.
Circuit judges.

CHARLES D. KIM,

Plaintiff-Appellee,

V. No.97-9142

DIAL SERVICE INTERNATIONAL, INC.,
DIAL SERVICE COMPANY, LTD. and
YURI KONNO,

Defendants-Appellants.

APPEARING FOR APPELLANTS:

RONALD M. GREEN,
Epstein Becker & Green, P.C.,
New York, NY (Lawrence Peikes,
William J. Milani, Mary Elizabeth Cisneros,
of counsel)

APPEARING FOR APPELLEE:

JOHN A. BERANBAUM,
New York, NY (Michael D. Paley, of counsel)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Denise L. Cote, Judge), and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff Charles Kim, a Korean-American, brought suit against his former employer Dial Service International ("DSI"), a Japanese-owned company, as well as its parent company in Japan (Dial Service Company, Ltd., or "DSC"), and the owner and Chief Executive Officer of DSI and DSC (Yuri Konno), alleging employment discrimination on the basis of race, national origin, and age, in addition to bringing claims for breach of contract and quasicontract. Defendants appeal from so much of an order of the district court as denied their motion for judgment as a matter of law or a new trial following a jury verdict in favor of plaintiff on his claim of race discrimination under 42 U.S.C. 1981.

Defendants assert that, insofar as plaintiff's claim of race discrimination is based on wage differentials between him and DSI employees of Japanese descent, this claim is not viable because it originates from actions taken prior to November 21, 1991, the effective date of the Civil Rights Act of 1991. Prior to that date, § 1981 was construed strictly to apply only to claims of racial discrimination in the formation and enforcement of contracts. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 179-80 (1989). The Civil Rights Act of 1991 expanded the scope of § 1981 to cover racial discrimination in the terms and conditions of employment as well. *See* Pub. L. 102-166, § 101, 105 Stat. 1071 (199 1). In *Rivers v. Roadway Express, Inc*, 511 U.S. 298) 313 (1994), the Supreme Court held that this provision of the Civil Rights Act of 1991 does not apply retroactively. Plaintiff's claim of

wage discrimination dates back to November 1990, when he was promoted to vice president but was paid a salary substantially lower than the salaries of vice presidents of Japanese descent. Defendants argue that, inasmuch as the Civil Rights Act of 1991 does not apply retroactively, plaintiffs claim is barred. This argument ignores the principle stated by the Supreme Court in *Bazemore v. Friday*, 478 U.S. 385 (1986), a Title VII case which characterized the harm imposed by a racially discriminatory pay scale by stating that "[e]ach week's paycheck that delivers less to a [disadvantaged class member] than to a similarly situated [favored class member] is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date" of limitation. id. at 395-96 (Brennan, J., concurring in part, joined by all other members of the Court); *see also Pollis v. New School for Social Research,* 132 F.3d 115, 119 (2d Cir. 1997). "Under this view, each continuation or repetition of the wrongful conduct may be regarded as a separate cause of action for which suit must be brought within the period beginning with its occurrence." *Pollis*, 132 F.3d at 119 (internal quotation marks and citation omitted).

This view of discriminatory pay scales disposes of defendants' "retroactivity" argument, because plaintiff's claim did not arise at a single point in time prior to the effective date of the Civil Rights Act of 1991, but arose with "each continuation or repetition" of discriminatory pay. This principle similarly disposes of defendant's argument that,

because suit was not filed until May 1996, over five years after plaintiff's first discriminatory paycheck was issued, plaintiffs claim is barred by the three-year statute of limitations applicable to § 1981 suits in New York, *see Tadros v. Coleman*, 898 F.2d 10, 12 (2d Cir.), *cert. denied*, 498 U.S. 869 (1990). Again, under *Bazemore*, each discriminatory paycheck constituted a new violation for which suit could be brought within the statute of limitations period beginning with its occurrence.

Defendants are correct, however, to argue that even if plaintiffs claim of discriminatory pay was not barred by the three-year statute of limitations, the jury's award of back pay should have been limited to the three-year period preceding the initiation of plaintiff's suit. This becomes clear from our recent decision in Pollis-which, we note, was published after the district court's opinion in this case. Although in cases of "continuing violations" of the anti-discrimination laws we have upheld awards of relief for injuries sustained prior to the beginning of the limitations period, *see Acha v. Beame*, 570 F.2d 57, 65 (2d Cir. 1978), we explained in Pollis that such relief is not available for a claim of discriminatory pay, which "is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action." 132 F.3d at 119. Hence, while each paycheck amounts to a new wrong from which the statute of limitations runs anew, the statutory period still

delimits the time frame within which back pay can be recovered. *See id.* (in Equal Pay Act case, "join[ing] the other circuits to have considered the issue, which have unanimously adopted the reasoning of Bazemore and concluded that back pay cannot be recovered under the Equal Pay Act for salary differentials outside the limitations period.... [A] plaintiff who complains of willful violation of the Equal Pay Act over a ten-year period of employment is not barred from bringing suit but should not be allowed to collect for damages outside the three-year limitations period.") (internal quotation marks and citation omitted); *cf Klehr v. A. O. Smith Corp.*, 117 S. Ct. 1984, 1990-91 (1997) (referring to principle of antitrust law, and adopting it in civil RICO case, that "each overt act that is part of the violation and that injures the plaintiff ... starts the statutory period running again ... [b]ut the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period").

Accordingly, defendants are correct to argue that plaintiff cannot recover back pay for any period that extends beyond the three-year statute of limitations. However, a remand to the district court is unnecessary inasmuch as defendants conceded before the district court that the jury's award of $170,000 in back pay did not include payments for any period more than three years prior to the initiation of suit in May 1996. During a post-trial hearing regarding the amount of pre-judgment interest to apply to the back pay

award, defendants explained the jury's $170,000 back pay award by arguing that "the only reasonable conclusion to come to is that the jury decided Mr. Kim was entitled to $85,000 a year and decided to award him that figure for the two-year period of time from July of 1995 when he was terminated until the approximate time of trial." The court subsequently adopted defendants' view in calculating pre-judgment interest. Defendants are therefore barred from claiming that some portion of the back pay award was intended to compensate plaintiff for a period of time prior to May 1993. *See Bares v. Long Island R.R. Co.*, 997 F.2d 1028, 1038 (2d Cir. 1993) (party judicially estopped from raising argument where the party argued an inconsistent position in a prior proceeding" and "the prior inconsistent position [was] adopted by the court in some manner").

Apart from these timeliness arguments, defendants argue that they are entitled to judgment as a matter of law because of the inadequacy of plaintiff's evidence of race discrimination. Although plaintiff's evidence was not by any means overwhelming, substantially for the reasons stated by the district court we are not persuaded that "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or . . . [that] there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded persons could not arrive at a verdict against it," *Eagleston v. Guido*, 41 F.3d 865, 875 (2d

Cir. 1994) (internal punctuation and citation omitted), *cert. denied*, 116 S. Ct. 53 (1995). *See Kim v. Dial Service Int'l, Inc., No.* 96-Civ-3327, 1997 WL 458783, at *8 (S.D.N.Y. Aug. 11, 1997). Substantially for the reasons stated by the district court, we also reject defendant's argument that a new trial is required because of inconsistent verdicts. *See id.* at *7. Defendants also raise four challenges to the court's jury instructions: (1) the instructions confusingly blended together the standards in so-called "pretext" cases and those in so-called "mixed motives" cases, *see generally Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 119-20 (2d Cir. 1997) (comparing these two broad categories of discrimination cases); (2) to the extent that this was a "mixed motives" instruction, plaintiffs evidence was insufficient to warrant such an instruction; (3) to the extent that this was a "pretext" instruction, the court understated plaintiff's burden of proof in a "pretext" case; and (4) the court failed to instruct the jury on the so-called "same actor" inference.

Although aspects of the court's charge might suggest that it was treating this as a "pretext" case, we are satisfied that the instructions on the whole accurately stated the requirements for a "mixed motives" case without confusing the two tests in a way that would be prejudicial to defendants. Moreover, we do not believe that the court erred in issuing a "mixed motives" instruction. Such an instruction is warranted where, *inter alia*, there is "evidence of statements or actions

by decisionmakers that may be viewed as directly reflecting the alleged discriminatory attitude." *Raskin v. Wyatt Co.*, 125 F.3d 55, 60-61 (2d Cir. 1997) (internal quotation marks and citation omitted). Among the direct evidence presented in this case was a memorandum written by DSC General Manager Shohei Ito, and forwarded to the then-President of DSI by Konno, which made a disparaging remark about Koreans. Testimony was adduced at trial that tended to show that Ito was a "decisionmaker" for purposes of the actions upon which plaintiff's claims of discrimination are based. Under these circumstances, we cannot say that the court erred by giving a "mixed motives" instruction.

Finally, we are not persuaded that a new trial is required based on the court's failure to instruct the jury that it could consider, as a factor weighing against a finding of discrimination, that the "same actor" (i.e., Konno) made the decision to hire and fire plaintiff. Although we have recognized the validity of this "same actor" argument, *see Grady v. Affiliated Central, Inc.*, 130 F.3d 553, 560 (2d Cir. 1997), we do not believe that defendants were prejudiced by the court's refusal to give an instruction on this issue, particularly inasmuch as over six years had passed between the time plaintiff was hired and the time he was fired. *See id.* ("same actor" inference particularly appropriate "when the firing has occurred only a short time after the hiring"). Notably, although the court told defendants that they remained free to make the "same actor" argument to the jury,

defendants failed to rely on this allegedly crucial aspect of their case in their closing argument.

We have considered all of defendants' other arguments, and find them to be without merit.

For the Court,
George Lange III, Clerk
by /s/ Lucille Carr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4 day of August one thousand nine hundred and ninety-eight.

Kim

Plaintiff-Appellee

v

Dkt No: 97-9142

Dial Service Inter

Defendant-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Dial Service.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that

no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

FILED: August 5, 1998

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES D. KIM,	
Plaintiff,	
-v-	: 96 CIV. 3327
	: (DLC)
DIAL SERVICE INTERNATIONAL, INC.;	
DIAL SERVICE COMPANY, LTD.; and	: OPINION &
YURI KONNO,	: ORDER
Defendants.	

DENISE COTE, District Judge:

Plaintiff Charles D. Kim ("Kim") has filed an application for attorney's fees in connection with the post-trial proceedings in this case, as well as for a release of bond. The issue of attorney's fees was referred to this Court by the Second Circuit on August 20, 1998, following its affirmance of the judgment in this case in June 1998. In the present motion, Kim seeks $48,036.25 in attorney's fees, and $1,987.42 in costs. The defendants have submitted papers in opposition to those amounts.

As an initial matter, the Court approves of the hourly rates set forth in Kim's moving papers as the rates upon which the requested fee award is based. The only issue with respect to fees, therefore, is the number of hours -- or, practically

speaking, the amount of work -- for which plaintiff's counsel is entitled to be compensated at those rates. In considering this issue, the Court has reviewed the defendants, specific objections to particular items or amounts of work claimed, the description by plaintiff's counsel of the various categories of work done, and the plaintiff's brief on appeal.

The defendants argue, and most importantly Kim does not dispute, that many or the issues addressed in Kim's appellate brief were matters that had already been litigated extensively before this Court, both through motion practice and at trial, so that plaintiff's counsel had already been reimbursed at the District Court level for the work involved in preparing and arguing these issues. That being the case, the Court need only determine the amount of work on the part of plaintiff's counsel that was necessary to secure an affirmance of the verdict on appeal. Based on an analysis of the sources noted above and the rates cited by Kim, the Court finds that an attorney fee award of $28,000 is reasonable in this case in respect of Kim's necessary appellate work.

On the issue of costs, the parties dispute the total amount of costs recoverable by Kim given the Second Circuit's denial (at least in part) of his application for costs on appeal. In any event, however, there is no dispute that Kim is entitled to $735.98 in costs incurred in connection with proceedings before this Court, either prior or subsequent to the appeal.

CONCLUSION

For the reasons set forth above, the Court concludes that Kim is entitled to an attorney's fee award of $28,000 with respect to the appeal of this action, and an award of costs in the amount of $735.98. In addition, Kim's request for a release of the supersedeas bond is granted.

SO ORDERED:

Dated: New York, New York
September 25, 1998

/s/ Denise Cote
DENISE COTE
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES D. KIM,	:	
Plaintiff,	:	
-v-	:	96 CIV. 3327
	:	(DLC)
DIAL SERVICE INTERNATIONAL, INC.;	:	
DIAL SERVICE COMPANY, LTD.; and	:	JUDGMENT
YURI KONNO,	:	
Defendants.	:	

This action came on for trial before the Court and Honorable Denise L. Cote, District Court, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, by way of a Special Verdict Form, and a Partial Judgment having been entered on June 25, 1997, and the Court having entered an Opinion and Order, dated August 7, 1997, it is now hereby

Ordered and Adjudged that the Partial Judgment is superseded by the herein Judgment; and

Ordered and Adjudged that the plaintiff, Charles D. Kim, recover jointly and severally of the defendants Dial Service International, Inc., Dial Service Company, Ltd. and Yuri Konno the following sums:

a) $170,000 plus prejudgment interest on $85,000 at a rate of 5.58% from July 28, 1996

in the amount of $4,208.76, for a total of $174,208.76; and interest thereon from the date of entry of Partial Judgment on June 25, 1997, at a rate of 5.88%, or a daily rate of $28.74, compounded annually; and

b) $275,885.02 with interest thereon from the date of entry of Partial Judgment on June 25, 1997, at a rate of 5.88%, or a daily rate of $44.41, compounded annually; and

c) $50,000 with interest thereon from the date of entry of Partial Judgment on June 25, 1997, at a rate of 5.88%, or a daily rate of $8.05, compounded annually, and

It is further Ordered and Adjudged that the plaintiff, Charles D. Kim, recover jointly and severally of the defendants Dial Service International, Inc., Dial Service Company, Ltd. and Yuri Konno attorneys, fees in the amount of $170,552.04, with interest thereon from the entry of the herein Judgment; and $19,448.21 in costs, with interest thereon from the date of entry of the herein Judgment at a rate of 5.8811, or a daily rate of $3.13, compounded annually.

Dated: New York, New York
September 24, 1997

/s/ Denise Cote
U.S.D.J.

(Cite as: 1997 WL 458783 (S.D.N.Y.))

Charles D. KIM,
Plaintiff,

v.

DIAL SERVICE INTERNATIONAL, INC.;
DIAL SERVICE COMPANY, LTD.; and Yuri KONNO,
Defendants.

No. 96 CIV. 3327(DLC).
United States District Court, S.D. New York.
Aug. 11, 1997.

OPINION & ORDER

COTE, District Judge.

Defendants Dial Service International ("DSI"), Dial Service Company ("DSC") and Yuri Konno ("Ms.Konno") move for (1) judgment as a matter of law, pursuant to Rule 50, Fed.R.Civ.P., or in the alternative for a new trial pursuant to Rule 59, Fed.R.Civ.P., and (2) for a new trial or, in the alternative for remittitur of the damage awards. The plaintiff Charles Kim ("Mr.Kim") moves for attorney's fees and costs pursuant to Section 1988, Title 42, United States Code. For

the reasons given below, the defendants' motion for judgment as a matter of law is granted in part and denied in part. The defendants' motion for remittitur is granted. The plaintiff's motion for attorney's fees and costs is granted.

BACKGROUND

On May 6, 1996, Mr. Kim filed a claim for employment discrimination for unlawful termination and differences in pay because of his age, race, and national origin. He brought this claim pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981A ("Title VII"); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"); the Civil Rights Act of 1870, 42 U.S.C. § 1981; the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.* ("NYSHRL"); and the Administrative Code of the City of New York ss 8-101 et seq. ("Administrative Code"). In an Opinion issued on January 8, 1997, this Count dismissed the plaintiff's claims under Title VII and the ADEA, and gave plaintiff leave to amend his Complaint to add state law claims for breach of contract and quasi-contract--arising out of defendants' alleged failure to pay plaintiff for services he performed under a contract defendants negotiated with another entity.

This Court conducted a jury trial from May 27 to June 5, 1997, on the plaintiff's claim of (1) race discrimination under Section 1981 and related state-law claims; (2) national origin discrimination under the NYSHRL and Administrative

Code; (3) age discrimination under the NYSHRL and Administrative Code; and (4) state-law contract claims. With respect to his employment discrimination claims, the jury returned a verdict for the plaintiff and against all three defendants on plaintiff's claim of race discrimination. The jury returned a verdict for the defendants on the claims of national origin and age discrimination. The jury awarded the plaintiff $170,000 in back pay, $325,000 in front pay to cover five years of lost work, and $300,000 in compensatory damages. After indicating that they felt an award of punitive damages was warranted against all three defendants, and after additional evidence and instructions, the jury awarded the plaintiff $750,000 in punitive damages.

With respect to his state law contract claims, the jury returned a verdict for the plaintiff on his claim of breach of contract and awarded him $7,000. The jury also found for the plaintiff on his quasi-contract claim of unjust enrichment and made ?? award of $70,000.

Although familiarity with this Court's earlier Opinion is presumed, I will briefly outline the evidence introduced at trial relevant to the motions now before this Court. Mr. Kim is of Korean national origin and was the only permanent non-Japanese employee of DSI. DSI is a New York corporation and is the subsidiary of DSC, a Japanese corporation with its principal place of business in Tokyo. DSC offers telephone consultation services for a variety of needs, including health inquiries, pet care, and child care.

DSI offers the same services but is directed towards Japanese living abroad. Ms. Konno is the sole owner, President and Chief Executive Officer of DSC and DSI. She controls the employment relations and management functions of both DSI and DSC and makes regular business trips to New York to oversee the DSI business and decide personnel issues. DSI executives do not make personnel decisions without consulting and receiving approval from Ms. Konno. DSC controls the management functions of DSI, including the hiring, firing, and setting of terms and conditions of employment for DSI's employees. DSI and DSC have common officers and directors and DSC owns 100% of DSI's shares. Ms. Konno also makes final decisions about major expenditures at DSI. DSI is financially dependent on DSC, relying on monthly transfers of funds to pay the salaries of DSI's employees and meet other obligations.

Mr. Kim worked at DSI from February 1989, when Ms. Konno hired him, until his discharge in July 1995. He was 63 years old when DSI terminated his employment. With degrees in electrical engineering and public administration, and accounting experience from working in a variety of small and large businesses, he was hired to help with immigration, tax and accounting issues for DSI. His initial salary was $30,000, which was raised to $40,000 a year later. Ms. Konno then promoted him in November 1990 to the positions of Vice President and Treasurer, with a salary of $53,000. He held these positions from November 1990 until his

termination.

When she promoted the plaintiff, Ms. Konno demoted the then-Vice President, a Japanese man, and gave Mr. Kim some of the former Vice President's responsibiiities. The former Vice President earned $85,000 a year and two other Vice Presidents, who were both Japanese, earned $60,000. The plaintiff's primary responsibilities revolved around the fiscal side of the business, while the Japanese executives supervised operations.

There was some evidence of racial animus in comments made by DSI and DSC employees. For example, a memo written by Ms. Konno in August 1992 to the DSI president stated that the company should not move its offices to Fort Lee, New Jersey because Koreans and other minorities lived in the area making it less safe. There was also evidence that plaintiff was told not to hire Korean accountants or utilize a Korean limousine service because DSI/DSC is a Japanese company. Finally, Ms. Konno addressed Mr. Kim in a demeaning manner.

When the plaintiff's employment was terminated in July 1995, he was the fifth DSI officer to leave the company since the company first started in 1987. Indeed, none of the Japanese officers at DSI had a long tenure there-- only one survived beyond a year--and the plaintiff had the longest tenure by far as an officer at DSI. There was evidence that DSI was never a financial success. DSI lost a total of $120,000 since it was started in 1987, and received regular

subsidies from its Japanese parent, DSC. In an effort to stem the DSI losses, DSC reduced the staff at DSI. By the time the plaintiff was fired, it had significantly fewer employees than when he began. A Japanese employee was fired at the same time as Mr. Kim.

In 1993, after losing $50,000 in the previou year, defendants asked Mr. Kim to reduce his hours and .e a cut in pay in order to help defray expenses. He refused and threatened that he would report DSI's violation of immigration laws- -DSI employed Japanese individuals who did not have work visas--to the American authorities to keep his job. On July 28, 1995, Mr. Kim was discharged. A younger employee who is Japanese assumed most of Mr. Kim's responsibilities for far less pay.

The plaintiff testified that the actions of the defendants caused him mental anguish, weight loss and depression; his wife corroborated this testimony. After losing his job, the plaintiff made very little effort to secure other employment and still does not have full-time employment.

In connection with his contract claims, Mr. Kim introduced evidence that he was not paid overtime for work he performed pursuant to a contract DSC negotiated with a Japanese organization, the National Institute for Research Advancement ("NIRA") for a 1990 symposium. The only evidence introduced at trial of a promise to pay plaintiff additional sums the NIRA work was the plaintiff's testimony of a conversation he had with the former Vice President. The

plaintiff testified that the former Vice President said that the work would be "paid for specially." The President of DSI testified that the former Vice President did not have the authority to make a promise regarding compensation as all compensation decisions were made by the DSC office in Japan. The plaintiff testified that he knew that compensation decisions were made in Tokyo. There was also evidence that the plaintiff was a salaried employee who was not eligible for overtime compensation.

Plaintiff also introduced evidence to support his quasicontract claim that he was not compensated for the work he performed under the NIRA contracts, apart from the 1990 symposium, from 1989 to 1993. The plaintiff testified that he expected to be paid for this work but never was. The defendants introduced evidence that the NIRA work was within the plaintiff's scope of employment, that he was told of the duties before he accepted employment at DSI, and was compensated for the work through two pay raises. The defendants also introduced evidence that the plaintiff remained at DSI for four years even after complaining of not getting paid additional compensation for the NIRA work.

Finally, there was evidence at trial that the plaintiff forged DSI checks and deposited them into his own account. The plaintiff testified that he was told to do this in order to use the money to pay the salaries of DSI employees who did not have necessary immigration papers to work legally in the United States and to pay certain vendors in cash. The

majority of the checks were made out to plaintiff's wife, Charlotte Kim, and then used to pay the illegal workers. The evidence demonstrated that the defendants were aware of this practice, and at least tacitly approved Mr. Kim's solution to the problem of how to pay their illegal employees. The checks payable to Charlotte Kim were made on a regular basis and always in the same amount--either $1,142.40 or $734.65-- with a notation of "payroll." A much smaller group of checks for relatively modest sums were made out to vendors, such as a delivery service, but then cashed by Mr. Kim after he forged their endorsements. The defendants contend they did not learn of these forged checks until discovery in this case. The plaintiff pointed to evidence that the defendants were well aware of this practice while he was there. The plaintiff testified that he needed to make the checks payable to a specified payee, rather than to cash, since he was not allowed to make checks payable to cash. The defendants introduced evidence that the plaintiff had written many checks payable to cash during his employment at DSI. The plaintiff asserted his Fifth Amendment privilege against self-incrimination when asked whether he fraudulently endorsed the checks or did so with the authority of the defendants.

STANDARDS

A. Judgment as a Matter of Law or a New Trial

A party may move for judgment as a matter of law pursuant to Rule 50(b), Fed.R.Civ.P. after having made such a motion during a trial at the close of all the evidence.[1] Rule 50(b) states that

> [i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury . . . . The movant may renew its request for judgment as a matter of law by filing a motion no later than ten days after entry of judgment. . . .

Fed.R.Civ.P. 50(b). The Second Circuit has held that the standard for granting judgment as a matter of law is as follows:

> In ruling on a motion for . . . [judgment as a matter of law], the district court is required to deny the motion unless, viewed in the light most favorable to the nonmoving party, the evidence is such that, without weighing the

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[1]The defendants preserved this right as they moved for judgment as a matter of law as to all of the plaintiff's claims at the close of all the evidence. The Court reserved judgment on the motion.

> credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict
>
> that reasonable [persons] could have reached.

Binder v. Long Island Lighting Co., 57 F.3d 193, 199 (2nd Cir.1995) (quoting *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038-39 (2nd Cir.1992)) (internal quotations and citations omitted). Further, the Second Circuit has held that a motion for judgment as a matter of law should be granted when

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded [persons] could not arrive at a verdict against it.

Eagleston v. Guido, 41 F.3d 865, 875 (2nd Cir.1994) (citation omitted) (brackets in original), *cert. denied*, --- U.S. ----, 116 S.Ct. 53, 133 L.Ed.2d 18 (1995).

The standard for granting a new trial, pursuant to Rule 59, Fed.R.Civ.P., is well-settled. This Court may grant a new trial if it is convinced that the jury's verdict was "against the weight of the evidence" or that the jury has reached a "'seriously erroneous result.'" *U.S. East Telecommunications,*

Inc. v. U .S. West Communications Services, Inc., 38 F.3d 1289, 1301 (2d Cir.1994) (quoting *Mallis v. Barkers Trust Co.*, 717 F.2d 683, 691 (2d Cir.1983)); *see also Piesco v. Koch*, 12 F.3d 332, 344 (2d Cir.1993) ("seriously erroneous" standard reaffirmed as the standard of Second Circuit). The Second Circuit has also characterized this standard as one of determining whether "the verdict is a miscarriage of justice." *Smith v. Lightening Bolt. Prod., Inc.*, 861 F.2d 363, 370 (2nd Cir.1988).

Under this standard, the Court "is free to weigh the evidence [itself] and need not view it in the light most favorable to the verdict winner." *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1047 (2d Cir.1992) (quoting *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir.1978) (citing 11 C. Wright & A. Miller Federal Practice and Procedure ??, at ?? (1973))). Even if there is substantial evidence to support the jury verdict, a new trial may be warranted. *Song*, 957 F.2d at 1047 (citing *Bevevino*, 574 F.2d at 683 (citing C. Wright & A. Miller, supra, § 2806, at 43)). Nevertheless, the Court must bear in mind that

> [w]here the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial.

Piesco, 12 F.3d at 345 (quoting *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir.1992), *cert. denied*, 508 U.S. 952,

113 S.Ct. 2445, 124 L.Ed.2d 662 (1993)).

B. Remittitur

Remittitur is the "process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1328 (2nd Cir.1990) (quoting *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2nd Cir.1984)) (internal quotation marks omitted). Before a court orders a plaintiff to make this choice, it must first determine whether the verdict is excessive. If it determines the award shocks the judicial conscience, the court should remit the jury's award to the maximum amount that would not be excessive. *Earl*, 917 F.2d at 1330. *See also Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 18 (2nd Cir.1996) (citation omitted) (in federal question case, district court has discretion to find award excessive if it "shock[s] the judicial conscience"). [2]

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[2]Since this Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, I will apply federal law in determining the excessiveness of the award. If this were a diversity case, I would apply New York law. *Gasperini v. Center for Humanities, Inc.*, --- U.S. ----, ----, 116 S.Ct. 2211, 2221, 135 L.Ed.2d 659 (1996); *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1011 (2nd Cir.1995), *vacated on other grounds*, --- U.S. ----, 116 S.Ct. 2576, 135 L.Ed.2d 1091 (1996). The difference is important as New York law instructs a court to determine whether the award "materially deviates from what would be reasonable compensation," N.Y. Civ. Prac. Law & Rules § 5501(c), a standard "less

1 Remittitur of a compensatory damage award

While it is properly within the province of the jury to calculate damages, there is "an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable [persons] may differ, but a question of law." *Mazyck v. Long Island R. Co.*, 896 F.Supp. 1330, 1336 (E.D.N.Y.1995) (quoting *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2nd Cir.1961)) (internal quotations omitted). Moreover, although a jury has broad discretion to award damages as it feels appropriate, "it may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket." *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2nd Cir.1993) (citation omitted). A jury verdict cannot stand if it is the result of a miscarriage of justice and represents a windfall to the plaintiff without regard for the actual injury. ?? v. ??, ?? F.Supp. 1115, 1121 (S.D.N.Y.1996).

To determine whether the award is excessive, it is appropriate to examine awards in similar cases. *Lee v. Edwards*, 101 F.3d 805, 812 (2nd Cir.1996) (quoting *Ismail v. Cohen*, 899 F.2d 183, 186 (2nd Cir.1990) (regarding

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deferential to the jury's verdict than the federal standard." *Consorti*, 72 F.3d at 1011. As I am not compelled to follow New York law, I will use the federal standard, but will still draw on New York case law in examining the size of awards given in similar cases.

damages, "whether compensatory or punitive")). A court should determine whether the award is "within reasonable range," not just "balance the number of high and low awards and reject the verdict in the instant case if the number of lower awards is greater." *Ismail*, 899 F.2d at 187. Additionally, in reviewing a damage award, it is important to examine the particular facts and circumstances of other cases and compare them to the current case. *Scala*, 985 F.2d at 684. Finally, a district court should not limit its comparison of awards to Section 1981 claims. *Ismail*, 899 F.2d at 186 (citing *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2nd Cir.1984) (in diversity cases, court should look to awards under comparable state laws); *Zarcone v. Perry*, 572 F.2d 52, 54-55 (2nd Cir.1978) (in federal civil rights claims a court should look at general damages principles)).

2. Remittitur of a punitive damage award

In *Lee*, the Second Circuit held that a trial court "may refuse to uphold a punitive damage award when the amount is so high as to shock the judicial conscience and constitute a denial of justice." *Lee*, 101 F.3d at 808 (citation omitted). To determine whether an award is excessive, the court must

> keep in mind the purpose of punitive damages, to punish the defendant and to deter him and others from similar conduct in the future. Thus, [the court's] task is to make certain that the punitive damages are reasonable in their amount and rational in light of their purpose

> to punish what has occurred and to deter its repetition.

Id. at 809 (internal quotations and citations omitted). The concept of deterrence "is directly related to what people can afford to pay." *Id.* at 813. To determine whether an award of punitive damages shocks the judicial conscience, a court examines three guideposts: (1) the degree of reprehensibility of the conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the difference between this penalty and comparable penalties authorized by law or imposed by judges and juries. *Id.* at 809 (citing *BMW of N. Am., Inc. v. Gore*, --- U.S. ----, ---- - ----, 116 S.Ct. 1589, 1598-99, 134 L.Ed.2d 809 (1996)). In *Gore*, the Supreme Court held that the first factor is the most important and that there are three aggravating factors that make some conduct more reprehensible than others. *Gore*, --- U.S. at ----, 116 S.Ct. at 1599. These factors are (1) whether the defendant's conduct was violent or threatened violence; (2) whether a defendant acted with deceit or malice and not merely negligence; and (3) whether a defendant has repeatedly engaged in the misconduct. Id. at 1599-1600.

After weighing these factors, a court should compare the instant damage award with other awards in comparable cases, *Lee*, 101 F.3d at 812, and examine the record to determine whether the award is supported by the evidence, *Id.* at 813.

C. Attorney's Fees

Section 1988, Title 42, United States Code, provides that

> [i]n any action or proceeding to enforce a provision of section[] 1981 . . . of this title . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. s 1988(b). As the Second Circuit has held, "[t]he district court is given broad discretion in granting a fee award and assessing a reasonable fee under the circumstances of the case." *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir.1997). To determine whether an attorney's fee is appropriate, the district court must determine whether a party is the "prevailing party," and whether the requested fee is reasonable. *Pino v. Locascio*, 101 F.3d 235, 237 (2d Cir.1996). To determine the appropriate amount of an attorney's fee for a prevailing party, the court calculates a "lodestar" figure whereby "the number of hours reasonably expended by counsel on the litigation [is] multiplied by a reasonable hourly rate." *Luciano*, 109 F.3d at 115. The reasonable hourly rate should "be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* (internal quotations and citation omitted). Adjustments to the lodestar figure are made to account for such items as unnecessary or unproductive services. *Murphy v. Lynn*,--F.3d--, 1997 WL 371091 at *14 (2d Cir. July 8, 1997).

To ascertain whether the fee is reasonable, however, the "most important factor . . . is the degree of success obtained." *Pino*, 101 F.3d at 237.

DISCUSSION

A. Judgment as a Matter of Law

1. Employment discrimination claims

The defendants contend that the jury's verdict is inconsistent because it found that the defendants had discriminated against the plaintiff on the basis of his race but not his national origin. The defendants argue that since the plaintiff did not distinguish between his race and national origin at trial, these two verdicts cannot be reconciled. The defendants maintain that since the plaintiff's race and national origin are the same--Korean--the defendants could not have discriminated against him on one basis but not the other. I disagree. The mere fact that the plaintiff's race and national origin are the same does not mean that the defendants could not and did not discriminate against him because of his Korean race, but not because he was born in Korea. It is entirely possible that it was irrelevant to the defendants where the plaintiff was born, but that they did care about his ethnic characteristics -- that is, his race.

The defendants also contend that plaintiff's claim of discrimination based on pay differentials cannot stand as a matter of law. I disagree again. Although the plaintiff did not assume all of the responsibilities of the former Vice President, and was not responsible for sales, marketing, or even

managing the workforce, his salary was lower than that of other Japanese officers. Based on this evidence, it cannot be said that there was "a complete absence of evidence supporting the verdict" or that the jury's verdict was the result of "sheer surmise and conjecture." In any event, the evidence of race discrimination should not be pigeon-holed into the separate effects that it had on the terms of the plaintiff's employment. The jury was entitled to make a judgment, based on all of the evidence, as to whether the defendants discriminated against the plaintiff because of his race and whether one of these forms of discrimination was the execution of a salary policy and practice to pay a Korean officer at a lower salary level than a Japanese officer.

The defendants contend that there was no basis for a finding that plaintiff's employment was terminated because of his race. The defendants point to the firing of Japanese employees as the primary support for their argument. I agree that this is strong evidence that race was not the motivating factor, but this evidence is not strong enough to support a finding of judgment as a matter of law. Even if others were fired for nondiscriminatory reasons, it could still be that the plaintiff was fired for discriminatory reasons. Given the sometimes open hostility towards the plaintiff because of his Korean race, it cannot be said that the jury's verdict was the result of sheer surmise or conjecture.

The defendants contend that this Court should rely on the "same actor" inference adopted by other Circuits. *See,*

e.g., ?? v. ?? Co., ?? F.2d ??, ?? Cir.1995), *cert. denied*, 116 S.Ct. 785 (1996). That inference instructs the factfinder that there is a strong presumption against a finding of discrimination where the same person both hired and fired the employee. Here, Ms. Konno made the decision to hire the plaintiff and also to terminate his employment six years later. I find that even if I were to give the defendants this presumption, it still is not strong enough to overcome the high standard imposed under a motion for judgment as a matter of law. The jury was well aware that Ms. Konno made both decisions, yet they still found for the plaintiff on his claim of race discrimination. A presumption can always be overcome and the jury's verdict was not so baseless such that no reasonable person could have reached the same conclusion. The jury could find, based on the evidence, that the defendants discriminated against the plaintiff throughout his employment: by hiring him at a salary below what a Japanese employee would have been paid and by firing him when they would not have fired a Japanese employee. Ms. Konno's testimony about her reasons for firing the plaintiff were so brief and conclusory that they were almost cryptic. Indeed, the defendants did not develop their argument that they terminated the plaintiff's employment due to their own economic exigencies or the plaintiff's poor performance. As a result, the jury was justified in believing that racial animus informed decisions about the plaintiff's employment at every step.

The defendants argue that the plaintiff's claim for pay differential is time barred because it did not arise after the effective date of the amendment to Section 1981 in 1991, an amendment which allowed claims for racial discrimination in the performance, and not just the making, of a contract. Defendants contend that since the pay differential between the plaintiff and the former Vice President arose in November 1990, it cannot be the basis for a claim. I disagree. The plaintiff's claim was more general, that is, that he was paid less than Japanese Vice Presidents--a disparity that continued throughout his employment at DSI. With respect to the amendment of Section 1981, the jury was specifically instructed not to make an award for a race discrimination claim for events occurring prior to November 21, 1991.

The defendants maintain that the plaintiff failed to prove a continuing violation and thus cannot recover for any pay disparity that extends beyond May 6, 1993, that is, beyond the three-year statute of limitations imposed for his Section 1981 claim.[3] I disagree. Every Japanese officer was

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[3]The jury was given the following instruction with respect to the continuing violation doctrine and the statute of limitations:

> The law requires a plaintiff to act with some speed in order to protect his rights. Under the applicable laws in this case, a plaintiff must file a complaint within three years of the allegedly discriminatory conduct. The rule is that only the conduct that occurred within the three years before the filing is the basis for a legal claim. If the

paid more than plaintiff. The jury could reasonably have found that this constituted a policy of unequal pay. The

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> conduct falls outside this three-year period, the plaintiff cannot recover for that alleged discrimination.
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> There is an exception to this rule for a plaintiff who has experienced a continuous policy and practice of discrimination. Discrete incidents of discriminatory treatment that are not related to discriminatory policies or mechanisms, however, cannot be considered by you. Instead, the plaintiff must prove that there were specific ongoing discriminatory policies or practices. If a defendant was aware of specific and related instances of discrimination and permitted them to continue unremedied over a significant period of time, you may find that those instances reflect the existence of a discriminatory policy or practice. If you find that there was a continuous policy of discrimination, then the plaintiff can recover for all the discrimination, no matter when it occurred, so long as the last discriminatory act in furtherance of the policy and practice fell within the three-year period.
>
> In this case, Mr. Kim filed his complaint on May 6, 1996. Therefore, you may consider any actions that happened three years prior to that date. That is, between May 6, 1993 and when he left DSI on July 28, 1995. To recover for any discriminatory employment decisions prior to May 6, 1993, Mr. Kim must prove that such decision was part of a continuous policy and practice of discrimination at DSI, and that one act in furtherance of this policy or practice occurred after May 6, 1993 and before Mr. Kim left DSI on July 28, 1995.

Ct. Exh. 5.

instant case is different from the Second Circuit's recent decision in *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir.1997), where the court held that a pay differential that continues after a discrete act, such as a demotion or job transfer is not a continuing violation despite the fact that the plaintiff may continue to feel the effects of the pay differential into the future. *Id.* at 907-08. In *Lightfoot*, the plaintiff had failed to present evidence of a discriminatory policy. *Id.* at 907. In the instant case, the jury was entitled to find that the defendants had a policy of paying the Japanese employees more than plaintiff and that this policy is what injured the plaintiff.

Finally, the defendants contend that plaintiff cannot ?? for any back pay award that ?? beyond the three year statute of limitations. As support, the defendants cite *Thomas v. Denny's, Inc.*, 111 F.3d 1506 (10th Cir.1987), and *Kornegay v. Burlington Indus., Inc* ., 803 F.3d 787 (4th Cir.1986). Both the Tenth and Fourth Circuits, however, have determined that the continuing violations doctrine does not apply to Section 1981 claims. Such a determination has not been made in the Second Circuit and indeed in this case, this Court held that the continuing violations doctrine did apply to the Section 1981 claims. *Kim v. Dial Serv. Int'l*, 1997 WL 5902, at *5 (S.D.N.Y. Jan.8, 1997) (relying on *Cornwall v. Robinson*, 23 F.3d 694, 704 (2d Cir.1994) and *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir.1993)). For this reason, I will not reduce the back pay award on the basis that Section 1981 does

not allow recovery beyond the statute of limitations.

For these reasons, I deny defendants' motion for judgment as a matter of law on the plaintiff's employment discrimination claims.

In the alternative, defendants move for a new trial. For the same reasons given above, I find that the jury's verdict was not against the weight of the evidence or a serious miscarriage of justice. There was substantial evidence to support the jury's findings and, moreover, these findings were based in large part on assessments of credibility as they had to ascertain the reasons for the termination of Mr. Kim's employment and the pay differentials. Given this importance of credibility, I decline to disturb the jury's findings and therefore deny the defendants' motion for a new trial on the plaintiff's employment discrimination claims.

2. State-law contract claims

As this Court charged the jury, in order to recover on a claim for breach of contract, a plaintiff must prove the existence of an agreement with reasonably certain terms and vague or non-specific promises cannot form the basis for a claim.[4] The only promise referred to in the testimony was the

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[4]The Court gave the jury the following instruction:

Mr. Kim alleges that DSI and DSC ("the corporate defendants") breached a contract that they had with Mr. Kim to pay him additional overtime wages for work on the 1990 NIRA symposium. To succeed on this claim, Mr. Kim must establish each of the following four elements by a preponderance of the

evidence:

> (1) that he entered into a valid contract with the corporate defendants that they would pay him additional compensation for his work on the 1990 NIRA symposium:
>
> . . . .

A contract is a promise or set of promises. The law recognizes a duty to perform these promises and provides a remedy if a party breaches one of these promises.

In order for a contract to be binding, there must be "mutual assent" to the terms and conditions of the contract. This is referred to as the "meeting of the minds." There must be a meeting of the minds of the parties on all essential terms of the contract. Assent may take the form written or spoken words or may be shown by the actions of the parties. Thus, assent may be implied when a party has conducted itself in such a manner that its assent may fairly be inferred. In sum, the intent of the parties is determined by what they said, what they did, their relationship and all of the surrounding circumstances.

To bind an employer, an individual must have the authority to make a promise on behalf of that employer. Therefore, if you find that a promise was made, you must find that the person who made the promise had the actual or apparent authority to bind the corporation. Apparent authority exists where the words or conduct of the corporate defendants caused Mr. Kim reasonably to believe that the individual had the authority to act on behalf of the employer.

Further, to find there was a valid contract, there must also be "consideration" for the promise to pay Mr. Kim additional wages. Consideration is a legal term that means either that some right or benefit accrues to one party, or that some loss, forbearance or responsibility falls to the other party. If a party makes a promise

promise that the work would be "paid for specially." This statement, standing alone, is insufficient as a matter of law to form a binding contract on which the plaintiff can recover. The promise was too vague. In *Saunder v. Baryshnikov*, 110 A.D.2d 511, 487 N.Y.S.2d 51 (N.Y.App.Div.1985), the court held that a promise "to take care" of the plaintiff and her "financial needs" was too vague and lacked material terms such as the "form, frequency and amount of payment." *Id.* at 52.

Additionally, the plaintiff did not demonstrate that the former Vice President had either the actual or apparent authority to promise plaintiff additional money. Plaintiff testified that he knew that only DSC, DSI's parent company, had the authority to make decisions about his compensation. The President of DSI also testified that he did not have the authority to make decisions regarding compensation, only DSC had such authority.

Finally, the plaintiff submitted no evidence of any consideration for the promise to pay him additional

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to do something which he is already bound to do, then there is no consideration. . . .

The law requires that a contract be reasonably certain as to its material terms. If a promise is too vague or non-specific, it is not an enforceable contract. . . .

Ct. Exh. 5. The plaintiff did not object to this charge.

compensation. Indeed, plaintiff was a professional employee who was not eligible for overtime compensation. He was expected to perform a variety of tasks without additional pay. As the New York Court of Appeals held in the seminal case,

> a promise made to induce a party to do that which he is already bound by contract to perform is without consideration. . . . Any change in an existing contract, such as a modification of the rate of compensation, or a supplemental agreement, must have a new consideration to support it.

Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 202-03, 131 N.E. 887 (N.Y.1921).

For all these reasons, I find that defendants are entitled to judgment as a matter of law on the plaintiff's claim for breach of contract.

Similarly, the plaintiff's quasi-contract claim for unjust enrichment cannot stand as a matter of law.[5] The

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[5]The jury was given the following instruction with regard to this claim:

Mr. Kim claims that from October 1989 through April ?? he has not compensated for work he did under the corporate defendants' annual contracts with NIRA. To recover under this claim, Mr. Kim must prove the following elements by a preponderance of the evidence:

(1) that he performed the services in good faith;
(2) that the corporate defendants accepted those services; (3)

plaintiff claimed that he was not paid for his work under the NIRA contracts, apart from the work on the 1990 symposium. The plaintiff did not, however, introduce any evidence to support his claim. There was ample evidence that the duties he performed under the contracts were within the scope of his employment and that he ratified these terms of his

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that Mr. Kim expected to be paid for the performance of the services;
(4) that Mr. Kim was not paid for those services; and
(5) the reasonable value of the services.

When a salaried employee sues his employer to recover for services rendered, he must show that the duties for which he seeks recovery were outside the scope of his employment such that it would be unreasonable for the employer to assume that the employee would not expect additional compensation beyond the employee's salary.

Further, if an employee keeps working under the terms and conditions imposed by his employer which the employee deems unacceptable or unsatisfactory, you may find that the employee has agreed to these terms of employment. If you find he so agreed, he cannot later sue for damages. Thus, if you find that Mr. Kim continued to work for DSI after knowing that he would not be paid extra money under the NIRA contracts, then he is said to have assented to those conditions of employment and they cannot form the basis for his claim.

If you find for Mr. Kim on this theory, then you should award him the reasonable value of the services he performed.

Ct. Exh. 5.

employment by continuing to work at DSI. The plaintiff testified that before he accepted employment at DSI he was told that his duties would include some of the NIRA work and that as his duties expanded he would receive additional pay. He did receive this additional pay as his salary increased from $30,000 to $40,000 within the first 18 months of his employment. When he was promoted to Vice President he received a salary of $53,000. There was ample evidence that plaintiff performed other jobs in addition to his accounting responsibilities, such as help Ms. Konno purchase art and perform work in connection with litigation.

Since the work was not beyond the scope of his employment contract and since plaintiff ratified any possible change to that contract by continuing to work at DSI, I grant defendants' motion for judgment as a matter of law with regard to plaintiff's quasi-contract claim for unjust enrichment.

B. New Trial Due to Inconsistent Verdicts

The defendants contend that the jury's award of $170,000 in back pay and $325,000 in front pay are logically inconsistent and thus defendants are entitled to a new trial. *Brooks v. Brattleboro Mem. Hosp.*, 958 F.2d 525, 529 (2d Cir.1992). Defendants contend that the jury's award of $170,000 in back pay appears to be compensation for the time between the termination of plaintiff's employment in late July 1995 and the verdict, in early June 1997, 22 months later. The defendants contend that this represents a salary of

$85,000 a year, while the award of $325,000 over the 5 years designated by the jury for front pay is an annual salary of $65,000.

There is another analysis of the verdict, however, which comfortably reconciles the awards of front and back pay. As noted, it appears that the jury felt that plaintiff was entitled to an annual salary of $65,000 when it made its award of front pay. If the jury awarded the plaintiff this amount for the nearly two years between his termination and the trial, this leaves $40,000 as back pay to recompense plaintiff for the pay differential between him and the Japanese officers while he was employed. Indeed, his salary was $53,000 and thus the difference was $12,000. After awarding the plaintiff $130,000 for the two years of lost earnings, the remaining $40,000 represents slightly less than $12,000 a year for the recoverable period between November 1991 and July 1995--three years and eight months. Although these figures do not add up with exactitude, they are a rough approximation, and I believe an accurate one, of the jury's intention. Indeed, given the clear message sent by the front pay award--$65,000 a year for five years--and the fact that this amount is a compromise between the $85,000 salary of the former Vice President and the $60,000 salary of the other two Japanese Vice Presidents, I find that the jury's verdict is quite consistent and shows that they determined the damages with precision.

For this reason, I find that the jury awards of front and

back pay are not inconsistent and therefore do not merit a new trial.

C. Unclean Hands

In response to the plaintiff's damages of front and back pay as well as his awards under his contract claims, the defendants assert the equitable defense of unclean hands, claiming that the plaintiff's forging of checks and blackmail of DSI not to reduce his hours or he would expose the immigration irregularities bars his recovery. The defendants did not argue the blackmail theory to the jury as a basis to deny the plaintiff an award of front and back pay, nor did they request a charge to the jury on this issue. As a consequence, it is waived. While I find that there was evidence supporting the defendants' claim of misconduct with regard to the forgeries, the jury was charged in this respect as to both the front and back pay awards[6] as well as the contract claims[7].

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[6]With regard to the award of front and back pay, the jury was given the following instruction:

Defendants contend that in the course of litigating this case, they recently discovered that Mr. Kim engaged in misconduct by cashing checks he had made payable to others. Defendants contend that if they had known of this misconduct during his employment with DSI they would have terminated Mr. Kim's employment for that reason alone, apart from their other allegedly nondiscriminatory reasons for their decision to terminate his employment. The defendants have the burden of proving by a preponderance of the evidence that they would have terminated his employment on the basis of the misconduct alone.

The jury was also told that they were allowed to draw a negative inference from the plaintiff's invocation of the Fifth Amendment privilege.[8] Thus, it cannot be said that the jury's

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If you find that Mr. Kim did engage in misconduct and such misconduct was so grave that defendants would have terminated his employment immediately after its disclosure and on the grounds of that misconduct alone, then this has two ramifications. First, you should not make an award of front pay. Second, Mr. Kim is entitled to back pay only until the defendants discovered the alleged misconduct.

Ct. Exh. 5.

[7]With regard to the contract claims, the jury was given the following instruction:

Defendants claim that Mr. Kim engaged in serious misconduct and that this should bar his recovery for each of his contract claims. If an employee is disloyal to his employer, he may forego his right to compensation.

Thus, if you find that Mr. Kim was cashing DSI checks made payable to others in order to keep that money for himself or otherwise not using the money for his employer's benefit, this fact alone would be sufficient for you to deny the plaintiff recovery on his contract claims. Defendants bear the burden of proving this defense by a preponderance of the evidence.

Ct. Exh. 5.

[8]With respect to the plaintiff's Fifth Amendment privilege, the jury was given the following charge:

You have heard the plaintiff decline to answer certain questions on

determination of the issue-- resting as it did on an assessment of the credibility of the witnesses--is the result of sheer conjecture or surmise. For this reason, I will not grant defendants' motion for judgment as a matter of law on this issue.

D. Remittitur

The defendants move for remittitur or a new trial on the jury's compensatory and punitive damage awards, claiming that they are excessive and should shock the judicial conscience. As discussed above, before granting such a motion, this Court must first determine whether the awards are excessive--in this case, $300,000 in compensatory damages and $750,000 in punitive damages. A court makes such a determination by comparing the instant award with other verdicts in similar cases and examining the evidentiary record to ascertain whether there is adequate evidentiary support for the award. I will apply this test to each award.

1. Compensatory damage award

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the ground of his Fifth Amendment privilege against self-incrimination. The Fifth Amendment of the United States Constitution affords every person the right to decline to answer any questions if he believes that the answers may tend to incriminate him. However, in civil cases, you are permitted, but not required, to draw the inference that the withheld information would have been unfavorable to the plaintiff. Any inference you draw should be based upon all of the facts and circumstances in this case as you find them.

Ct. Exh. 5.

The jury's award of $300,000 is clearly excessive given other verdicts in this area. An examination of other cases--circuit and district court cases discussed in reverse chronological order--demonstrates that upholding a $300,000 award for compensatory damages for emotional distress would be unprecedented. For example, in an age discrimination case brought under New York and federal law, the Second Circuit affirmed the trial court's remittitur of a jury award of nearly $498,000 for pain and suffering to $5,000. *Binder*, 57 F.3d at 198, 202. The defendants terminated plaintiff and did not find him similar employment within the company, although other positions were available. These positions were given to younger employees. *Binder v. Long Island Lighting Co.*, 847 F.Supp. 1007, 1009 (E.D.N.Y.1994). The trial court found that the award was "grossly excessive" based on the plaintiff's scanty evidence of emotional distress. *Id.* at 1028. It also found that the jury award was likely the product of a specific calculation--because the actual award was for a specific amount, $497,738--yet the jury had no evidence on which to base a calculation. *Id.*

In *Miner v. City of Glens Falls*, 999 F.2d 655 (2nd Cir.1993), the trial court determined that a $12,000 award in a Section 1983 suit was not excessive for a police officer, denied due process and forced to retire, who suffered humiliation as he applied for public assistance, sold his new home, and had deteriorating relations with his family. *Id.* at

662-63.

In a suit brought by an African American corrections officer under 42 U.S.C. §§ 1981, 1983, and Title VII, for inter alia racial harassment, failure to promote, poor job assignments, an unwarranted disciplinary sanction and unjustified public embarrassment, the Second Circuit upheld the district court's determination that a $50,000 award was not excessive. *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 955 (2nd Cir.1988).

In an employment discrimination case brought under Title VII, Section 1981, and the NYSHRL, the jury awarded over $219,000 in compensatory damages. *McIntosh v. Irving Trust Co.*, 887 F.Supp. 662, 663 (S.D.N.Y.1995). The court found that the award shocked the judicial conscience, was out of line with other compensatory damage awards for emotional distress, and was not founded in the evidence introduced at trial and therefore reduced the award to $20,000. *Id* . at 669. The court in that case also conducted a survey of recovery under New York law for emotional distress and found that jury awards range from $5,000 to $15,000. *Id*. at 666-69.

In a case of housing discrimination brought by an interracial couple and their child under 42 U.S.C. §§ 1981, 1983, the Fair Housing Act (42 U.S.C. §§ 3601-19), and New York law, a jury awarded each parent $100,000 and the child $80,000 for emotional distress associated with the discrimination. In addition to determining that a causation issue needed to be reexamined in connection with the jury

award, the trial court found that the $280,000 award shocked the judicial conscience and granted a new trial on compensatory damages. *Portee v. Hastava*, 853 F.Supp. 597, 612-13 (E.D.N.Y.1994), *aff'd*. 104 F.3d 349 (2d Cir.1996).

Based on this survey of compensatory damage awards in other cases, I find that the $300,000 award is excessive and should be remitted to $25,000. I find that this is the appropriate award given the sparse evidence introduced at trial regarding the plaintiff's mental anguish. An examination of similar cases again, organized by level of court and age--reveals that plaintiff did not present either the quality or quantity of evidence to support a $300,000 award.

Some courts have upheld awards with speculative evidence, but the awards have been for much smaller amounts. For example, in an age discrimination case brought under New York law, the Second Circuit determined that an "extremely modest" award of $18,000 for emotional distress did not shock the judicial conscience. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1190 (2nd Cir.1992). In that case, a 48-year-old salesman was terminated and denied a transfer to a different office. Subsequently, thirteen salespeople, all of whom were younger than plaintiff, were hired in positions similar to the one plaintiff sought. *Id.* at 1179. Plaintiff testified that losing his job was "like a divorce, your wife died or state of shock." *Id.* at 1190.

A trial court did find sufficient substantiation to uphold an award in *Marfia v. T.C. Ziraat Bankasi, New York*

Branch, 903 F.Supp. 463 (S.D.N.Y.1995), *vacated on other grounds*, 100 F.3d 243 (2d Cir.1996). In that case, the trial court let stand a jury award of $100,000 for pain and suffering where a bank employee of Italian national origin was fired from a Turkish bank in New York and was subject to harassment while employed at the bank because of his national origin. The plaintiff tried to kill himself but was stopped by his 15-year-old son. The plaintiff then spent two weeks in the hospital under a suicide. *Id.* at 467, 471.

In *Lightfoot v. Union Carbide Corp.*, 901 F.Supp. 166 (S.D.N.Y.1995), *aff'd in part and vacated and remanded in part*, 110 F.3d 898 (2d Cir.1997), an age discrimination suit brought under New York and federal law, the court remitted a compensatory damages award of $750,000 to $75,000 because the award was not in accord with other awards and was not founded in the evidence at trial. *Id.* at 169-70.[9] The court specifically compared that case with *Marfia, supra*, and found no such compelling circumstances.

In the instant case, there was no compelling evidence such as that found in *Marfia*. The testimony regarding the plaintiff's mental anguish was essentially the following: Mr. Kim testified that he felt "gloomy" and had difficulty

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[9]Although the Second Circuit remanded this portion of the District Court's opinion, finding that the court should have given the plaintiff the option of a new trial, the Second Circuit did not disagree with the amount of, or reasons for, the remittitur. *Lightfoot*, 110 F.3d at 914-15.

sleeping. He also testified that he lost his appetite and as a result lost 20 pounds. The plaintiff testified that he drank at home and took sedatives. The plaintiff's wife testified that the plaintiff did not like to socialize as a result of the discrimination, had difficulty sleeping, drank and took sedatives. The plaintiff's wife also testified that plaintiff did not enjoy leisure activities such as going to a health spa or playing golf. She testified that this lack of interest in life continues, although somewhat improved, to the present.

The defendants contented that the plaintiff did not prove that his mental suffering was connected with the discrimination. I disagree. I find that although the testimony was generalized, it was sufficiently specific to show that the symptoms started while he worked at DSI and continued during his employment there. Much of the testimony regarding mental anguish, however, was tied by the plaintiff to the conversations which he contended proved age discrimination. As a consequence, a certain amount of his suffering must be attributed to a theory on which he did not recover. While I do find that the plaintiff suffered some mental anguish from the race discrimination which he proved, I do not find that the evidence introduced merits an award of $300,000. Rather, the maximum amount that would not be excessive is $25,000. For this reason, I will grant the defendants' motion for a remittitur of the compensatory damages award in the amount of $275,000, and thus make an award of compensatory damages in the amount of $25,000.

2. Punitive damage award

The defendants challenge the jury's award of $750,000 in punitive damages. They claim that there is no basis for any punitive damage award, or in the alternative, it should be radically reduced. I will not disturb the jury's determination that punitive damages were warranted in this action. There was sufficient, albeit not overwhelming, evidence to uphold such a finding. Indeed, the defendants mounted almost no defense to the plaintiff's case, instead relying on weaknesses in the plaintiff's case. Ms. Konno briefly testified about her commitment to world peace and intercultural understanding. Based on the lack of contradictory evidence, the jury could well have determined that the defendants' actions were willful or malicious.

I do find, however, that the award is grossly excessive and should be reduced. Using the Second Circuit decision in Lee and the Supreme Court's decision in Gore, I find that the three guideposts for an award of punitive damages--reprehensibility, ratio to compensatory damages, and other authorized penalties all militate in favor of reducing the award.

First, the degree of reprehensibility is low in this case. Weighing the three factors relevant to reprehensibility discussed above, I find that there was no violence and very little repetition of the misconduct. The gravamen of the plaintiff's case was wrongful termination, which, obviously, occurred only once. There was evidence, however, to support

the plaintiff's claim for a pay disparity and this conduct did persist throughout the plaintiff's employment at DSI. For these reasons, I find that the first factor weighs in the defendants' favor and the third factor weighs in neither party's favor. It is the second factor--the malice of the defendants' actions--that weighs more strongly for the plaintiff. I place reliance here on the jury's determination that the defendants acted with malice when they discriminated against the plaintiff on the basis of his race. As discussed above, there was evidence to support such a finding. I do not find, however, that there was particularly strong evidence such that it would support a punitive damage award of $750,000.

Finding that the defendants' actions were reprehensible but not overly so, I turn to the ratio of the award to compensatory damages. The total of non-exemplary damages to which the plaintiff is now entitled, after remitting the compensatory damage award and deducting the contract claims, is $520,000. The jury's award of $750,000 in punitive damages does not result in a gross disproportion between the exemplary and non-exemplary damages. If, however, a comparison is made of compensatory damages awarded through the remittitur-- $25,000--and the punitive damage award, there is a material disproportion. I realize that, standing alone, such a disproportion is not determinative since punitive damages may be awarded under Section 1981 when the only non- exemplary damages are nominal damages. *Lee*, 101 F.3d at 811. Nonetheless, in this case, it is

appropriate to measure the punitive damages against the far smaller figure for compensatory damages, since, in my view, the award of front pay, and indeed back pay for the period following the plaintiff's termination of employment, must be viewed as largely punitive. Many Japanese employees lost their jobs at DSI due to its continual loss of money. Only the plaintiff will receive $65,000 a year for approximately seven years after leaving the company. He will receive this money despite scant evidence that he made any effort to mitigate his damages or ever intended to work that long. As a consequence, when viewed against the $25,000 in compensatory damages that I have determined to be appropriate, the award of $750,000 in punitive damages is disproportionate.

The final factor--the comparison with civil penalties for similar conduct-- demonstrates that the $750,000 award is far too great. Under the NYSHRL, a plaintiff may recover no punitive damages. *Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 591 N.Y.S.2d 978, 981-82, 606 N.E.2d 1369 (N.Y.1992). Title VII places a strict control on damage awards depending on the number of employees of a defendant. Even if all of the defendants' approximately 320 employees counted towards the statutory cap--and I explicitly found in my prior Opinion that the employees in Japan did not count toward the statutory requirements of Title VII- -the plaintiff's damages for future economic loss, compensatory damages and punitive damages would be capped at $200,000.

42 U.S.C. s 1981a(b)(3)(C). The front pay award alone already exceeds this limitation and certainly the punitive damage award is far greater than this limit. Moreover, if the number of employees at DSI exceeded the 15-person statutory minimum--and, as I noted in my prior Opinion, it is undisputed that DSI employs fewer than 15 people--the applicable limitation would cap plaintiff's damages at $50,000. 42 U.S.C. s 1981a(b)(3)(A).

Finally, although there was conflicting evidence introduced at trial regarding the financial resources of the defendants, I find that a punitive damage award of $750,000 exceeds a proper amount to achieve the dual purpose of deterrence and punishment. A punitive damage award is not intended to bankrupt a defendant. *Smith v. Lightning Bolt Prod., Inc.*, 861 F.2d 363, 373 (2d Cir.1988). There was evidence that Ms. Konno's income in 1996 was $370,000, but there was also evidence that she carries substantial debts. DSI lost $50,000 in 1996 and owed $180,000 in debts. DSC's profits in 1996 were only $70,000.

The plaintiff cites only one case in this Circuit where a large punitive damage award was upheld. In *Marfia*, the district court upheld a $1 million punitive damage award, but noted expressly that in doing so it relied on the callousness of the defendant's conduct and the large size of the international business run by defendant. *Marfia,* 903 F.Supp. at 472. Neither factor is present here to the degree found in *Marfia.*

For all these reasons, I find that a punitive damage

award of $25,000 is proper and therefore grant the defendants' motion for remittitur of the punitive damage award in the amount of $725,000.

To summarize, the plaintiff's entire damages consist of the following amounts: $170,000 in back pay, $325,00 in front pay, $25,000 in compensatory damages and $25,000 in punitive damages.

E. New Trial on all Issues versus Damages

When a court grants a new trial as an alternative to remittitur, it must determine whether to grant a new trial on all issues, or a discrete issue, such as damages but not liability. The standard set by the Second Circuit is that

> a partial new trial may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.

In re Joint E. Dist. & S. Dist. Asbestos Lit., 995 F.2d 343, 346 (2nd Cir.1993) (quoting *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 709 (2nd Cir.1983) (internal quotation marks and citation omitted)). In that case, the Second Circuit determined that since

> the same jury heard the liability and damage phases of the trial, [it makes] partial reversal more problematic than it would be if separate juries had been impaneled.

Id. The determination, therefore, rests on the separability of

the issues.

In the instant case, the punitive damage award was closely linked to the evidence of liability--that is, whether the defendants' actions were malicious--such that it would be difficult to re-try only that portion of the case. The compensatory damage award also requires the jury to understand the context for the mental anguish. For these reasons, I find that it is appropriate to grant a motion for a new trial on the issues of both damages and the defendants' liability for the race discrimination claim.

F. Attorney's Fees

The plaintiff moves for an award of attorney's fees pursuant to Section 1988, Title 42, United States Code. I find that such an award is appropriate, but in a lower amount than the requested lodestar. Having excluded some time already,[10] the plaintiff requests reimbursement for the remainder of his work on all of the claims, contending that they are intertwined and cannot be separated.

The plaintiff requests the following lodestar in connection with work performed through the time of trial:

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[10]The plaintiff has already deducted 97 hours of work performed in connection with the unsuccessful Title VII and ADEA claims as well as additional time spent to amend the Complaint to include the contract claims as there is no right to recovery of attorney's fees for those claims.

Attorney	Hours	Rate	Total
John Beranbaum	600.2	$250	$150,050
Michael Paley	620.9	$175	$108,657.50
Paralegal (lawyer)	26.9	$75	$2,010
Law student	11.5	$65	$747.50
		Lodestar:	$261,465

Defendants contend that (1) the hourly rates are excessive; (2) the lodestar should be reduced by 66% to reflect the plaintiff's limited success on his employment discrimination claims--he did not win on his claims of age and national origin discrimination--and the contract claims for which there is no statutory authority for awarding attorney's fees; (3) the lodestar should be further reduced by 30% to account for vague billing entries; and (4) the lodestar should be further reduced by 30% to account for duplicative and excessive billings. I will address each argument in turn.

1. Hourly rates

A reasonable hourly rate should "be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Luciano,* 109 F.3d at 115 (internal quotations and citation omitted). The defendants contend that the requested hourly rates are excessive and propose hourly rates of $225 for Mr. Beranbaum and $150 for Mr. Paley. I find that the requested rates are not excessive.

Mr. Beranbaum graduated from New York University

Law School in 1981 and has been practicing law in the public interest ever since. He worked for the Legal Services Corporation for four years, doing litigation. He then worked for developmentally disabled children and represented them in administrative proceedings and in trials in federal court. He also worked for two private firms, representing labor unions. At one of the firms, he specialized in employment discrimination cases. He founded his own firm in August 1995 to represent plaintiffs in employment discrimination cases. He acknowledges that he does not have a regular billing rate as nearly all cases are taken on a contingency basis. Similarly, Mr. Paley graduated from New York University Law School in 1992, where he was a recipient of the prestigious Root-Tilden-Snow scholarship for students pursuing careers in the public interest. Mr. Paley clerked for a federal judge in the Southern District of New York after graduation, then worked for nearly three years at a mid-size commercial firm in New York City. Mr. Paley joined Mr. Beranbaum's office in August 1996. The plaintiff submitted affidavits that his requested rate of $250 per hour and Mr. Paley's rate of $175 reflect appropriate rates for attorney's of like skill and experience in Manhattan.

Based on my knowledge of prevailing rates for attorneys in this district and the evidence offered in support

of the rates, I find that requested rates are appropriate.[11]

2. Limited success and contract claims

The plaintiff seeks an award for the fees for litigating all of his claims, maintaining that the claims are so intertwined that they cannot be separated. The defendants contend that the lodestar should be reduced by 66% to reflect the unsuccessful employment discrimination claims and the contract claims for which there is no basis for recovering an attorney's fee.

As noted above, to ascertain whether a fee is reasonable, the "most important factor ... is the degree of success obtained," *Pino*, 101 F.3d at 237, and a plaintiff's award should be reduced where he does not achieve full success, although a court need not apportion the fee award mechanically based on the successful claims. *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); *Hensley v. Eckerhart*, 461 U.S. 424, 436, 438, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053, 1056 (2d Cir.1989). If a court finds, however, that the successful and unsuccessful claims are so intertwined that separation is impossible, the court may award the full application. *Hensley*, 461 U.S. at 438. In *Hensley*, the Supreme Court found that the district court did not err when it refused to

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[11]The defendants do not contest the hourly billing rates for the paralegal work performed by an attorney as well as the work performed by the law student.

apportion the fee based on successful and unsuccessful claims because of "the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues". *Id.* Despite this, the Court reversed the district court's award because it held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees," *id.* at 440, and the district court had not made an explicit finding to this effect. *Id.* at 439. The Supreme Court held that

> [w]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Id. at 440. Even though the plaintiff's claims were "nonfrivolous, and raised in good faith" and even if counsel tried the case with "devotion and skill," an award of fees is not appropriate where the plaintiff has not had success. *Id.* at 436.

The Second Circuit has held that

> [w]here the district court determines that the successful and unsuccessful claims are "inextricably intertwined" and "involve a common core of facts or [are] based on related legal theories," it is not an abuse of discretion for the court to award the entire fee.

Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1183 (2d Cir.1996). In the instant case, the plaintiff prevailed only on his claim of race discrimination. His claims for national origin discrimination, and to a lesser extent age discrimination, however, were intertwined with the race discrimination claim. Thus, although he lost on these claims, he did win a substantial award for his claim of race discrimination, even after this Court remits the compensatory and punitive damage awards. I find that the additional work to bring the age and national origin discrimination claims is not so great that it merits a substantial decrease in the lodestar. I do, however, find that a decrease of 15% to reflect the age discrimination claim primarily is warranted. Additionally, I will reduce the lodestar by a further 15% to reflect the work on the contract claims. There is no basis for awarding attorney's fees on these claims, and I disagree with the plaintiff's argument that the work to prove these claims was encompassed within the work on the employment discrimination claims. They were separate claims with separate theories that had to be proved at trial. I find that the 15% reduction is appropriate. Although this total reduction of 30% is less than half of the reduction requested by defendants, I find that it is sufficient.

The defendants further request that the fee be reduced to reflect work performed for the Title VII and ADEA claims, which were dismissed by this Court in the January 8, 1997 Opinion, as well as work arising from the plaintiff's

invocation of his Fifth Amendment privilege and from his use of interpreters. In this last connection, the plaintiff contends that his trial preparation work was particularly time consuming because he had to use interpreters in speaking with his client and certain other witnesses. As we all discovered at trial, however, these witnesses had a sufficient command of English to give their testimony largely without the use of an interpreter. I find that a further reduction is appropriate for each of these reasons and reduce the lodestar by a further %5. Thus, the total deduction for the above reasons is 35%.

3. Vague billing entries

In making an application for attorney's fees, a party is required to submit adequate documentation of the work performed by each attorney. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir.1983). The defendants contend that the plaintiffs have not done so and thus the lodestar should be reduced by 30%. I find that this is far too great and will impose only a 5% reduction to account for the vague billing entries.

4. Unnecessary and duplicative work

A plaintiff should not recover fees for a duplication of effort. *Luciano*, 109 F.3d at 111. A court properly reduces a fee for work that is excessive. *Hensley*, 461 U.S. at 436; *Luciano*, 109 F.3d at 111. The defendants contend that Mr. Beranbaum performed work that should have been performed by an associate and that Mr. Paley performed work that should have been done by a paralegal. I agree, although to a

far less extent than is described by the defendants. Depending on the task, an hour spent by experienced counsel can be far more efficient and effective than time spent by less experienced staff with insufficient guidance. Nonetheless, I find in this case that senior counsel's involvement was to some extent inefficient and requires an adjustment to the fee award.

In addition, the lodestar should be reduced to reflect duplicative work by the two plaintiff's attorneys. Many of the entries show that both attorney's did the same work at the same time when only one attorney's time was necessary. For these reasons, I will reduce the lodestar by 10%.

G. Summary of Attorney's Fees Calculation

To summarize, I find that the plaintiff's proposed lodestar of $261,465 should be reduced in the following manner. First, I will reduce the original lodestar by 5% to reflect the vague billing entries and a further 10% to reflect duplicative or unnecessary work. This is a total reduction of 15%, thus equalling a new lodestar of $222,245.25. I will then reduce this amount by 35% to reflect the plaintiff's limited success and for his contract claims. Thus the total award is for $144,459.41.

H. Costs

When a court makes an award of attorney's fees, it should also award the prevailing party "reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients," so long as these costs

are "indidental and necessary to the litigation." *Reichman v. Bonsignore, ?? & Mazzota P.C.*, 818 F.2d 278, 283 (2d Cir.1987) (internal quotations and citations omitted). The plaintiff seeks reimbursement for $29,920.32 in costs and has produced documentation for all of the requested expenses.

The defendants contend that the award should be reduced by the same percentage as the fee award to reflect the plaintiff's limited success and contract claims. I agree and will reduce the award of costs by 35%, as I did with the award of attorney's fees. The defendants also contend that plaintiff should not be reimbursed for specific items. First, the defendants contend that the use of interpreters for the plaintiff and another witness at trial and at their depositions was unnecessary because these witnesses spoke English. Although these witnesses did speak English, an interpreter was sometimes needed to ensure that the testimony was accurately presented and understood by the court and jury. For this reason, I find that these expenses should be reimbursed.

Second, the defendants contend that the plaintiff should not be reimbursed for (1) his own use of taxis and for bridge tolls--apart from the travel expenses of the attorneys--a total of $309.40; (2) attorney travel expenses, a total of $275.68; (3) postage expenses, a total of $80.05; (4) miscellaneous items such as temporary secretarial work, use of facsimiles, paralegal help and office supplies, for which the defendants do not provide a total; (5) service of witnesses, a

total of $963; and (6) translation of documents, a total of $6,843. Although the defendants provide scant legal authority for these reductions, I agree that the plaintiff should not be reimbursed for his own travel, that postage should be included in the overhead of a law firm, and that the services of a translator were unnecessary given the plaintiff's expertise as a translator. Only if there were disputes as to the accuracy of a translation--and there were none--would the services of another translator have been required. Given the overarching 35% reduction, however, I find that I need not further reduce the award of costs to reflect these specific items. Thus, I find that the plaintiff is entitled to an award of costs in the amount of $19,448.21.

I. Supplemental Attorney's Fees and Costs

Plaintiff requests an award of $40,142.50 in supplemental fees to reimburse him for work performed in connection with the post-trial motions and preparing this fee application.[12] I will award the plaintiff fees associated with the post-trial motions and the work on his application for attorney's fees. *Reed*, 95 F.3d at 1183-84 (finding it appropriate to award fees incurred in making an application for attorney's fees). The defendants oppose this request, making the same arguments as they did against the original request.

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[12]The plaintiff has already made reductions in the request to reflect unnecessary work as well as work performed on the state-law contract claims.

I find that it is appropriate to reduce the supplemental fee request as the work performed since the trial suffers from the problems discussed above. That is, plaintiff performed some unnecessary, duplicative and excessive work, and filed a fee application that still includes some of the work for the contract claims even though there is no basis for recovering those fees. For these reasons, I will reduce the award by 35%, for a total award of $26,092.63.

CONCLUSION

For the reasons given above, it is hereby

ORDERED that defendants' motion for judgment as a matter of law with regard to the plaintiff's claim of race discrimination is denied.

IT IS FURTHER ORDERED that the defendants' motion for judgment as a matter of law with regard to the plaintiff's contract and quasi-contract claims is granted.

IT IS FURTHER ORDERED that plaintiff's attorney may file with the Clerk of Court on or before August 29, 1997, an acceptance of a remittitur of $275,000 for his compensatory damage award and $725,000 for his punitive damage award, for a final judgment of $25,000 in compensatory damages and $25,000 in punitive damages.

IT IS FURTHER ORDERED that in the event plaintiff's attorney does not file an acceptance of the remittitur on or before August 29, 1997, a new trial on liability and damages for the race discrimination claim will commence on a date to be set by the Court.

IT IS FURTHER ORDERED that the plaintiff's motion for attorney's fees and costs is granted in the following amounts: $144,459.41 in attorney's fees, and $19,448.21 in costs.

IT IS FURTHER ORDERED that the plaintiff's motion for an award of supplemental attorney's fees is granted in the amount of $26,092.63.

SO ORDERED.

Dated : NewYork, New York
August 7, 1997

/s/ Denise Cote

Denise Cote
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES D. KIM,	:	
Plaintiff,	:	
-v-	:	96 CIV. 3327
	:	(DLC)
DIAL SERVICE INTERNATIONAL, INC.;	:	
DIAL SERVICE COMPANY, LTD.; and	:	
YURI KONNO,	:	
Defendants.	:	

JURY CHARGE
June 4, 1997

Pretext

In determining whether plaintiff has proven that the defendant you are considering intentionally discriminated against him because of his race, national origin or age, the first question you must consider is whether the plaintiff has proven by a preponderance of the evidence that the defendant's explanations for its employment decisions are pretextual, ie., that they are unworthy of belief and were not in fact motivating factors in the employment decisions.

When you consider this issue, keep in mind that the

relevant question is whether the reasons advanced by the defendant were the actual reasons for the actions. The question is not whether a defendant showed poor or erroneous judgment in acting as it did. You are not to judge the wisdom of a defendant's actions. An employer is entitled to make its decisions for good reasons, bad reasons, or for no reason at all, so long as the decision is not motivated by discrimination. You should also keep in mind that a defendant was entitled to set its own expectations and requirements as to what constitutes satisfactory performance. You are not to judge a defendant's standards of expected performance. Rather, in evaluating whether the explanations given by a defendant for its employment decisions are pretextual, you are to examine how a defendant treated the plaintiff given the defendant's legitimate expectations of performance. You may consider whether the asserted reasons comport with the defendant's own policies and rules and whether such policies and rules have been applied ;uniformly.

A Motivating Factor

The second question you must answer is whether the plaintiff has proven that the defendant you are considering acted as it did because of Mr. Kim's race, national origin or age. Mr. Kim must prove by a preponderance of all the evidence that race, national origin or age was a motivating factor in the employment decisions at issue in this case. He

need not, however, establish that race, national origin or age was the sole or principal reason for the decisions.

If you have found that (1) the nondiscriminatory reasons put forth by a defendant for its employment decisions were not actual motivating factors in the decisions, and (2) that Mr. Kim was satisfactorily performing his work at the time his employment was terminated, or that he qualified for a higher salary, raises, or compensation for the work he performed, then you may infer, but are not required to, that the defendant acted because of Mr. Kim's race, national origin or age.

In relation to his claims for discrimination, Mr. Kim contends that certain discriminatory comments were made to him. The defendants deny that any comments made were intended to be pejorative. If you determine that anyone at DSI or DSC made discriminatory comments to Mr. Kim, you should consider the degree to which that animus affected decisions on his compensation or the ultimate decision to discharge him, if it affected them at all, taking into account the time that passed between the alleged statements and those decisions, as well as the role, if any, of the people who made the comments in the decisions. If you find that any discriminatory comments about Mr. Kim were made by DSI or DSC employees who were involved in the compensation decisions or the decision to terminate plaintiff's employment with DSI, then you may find that those comments are circumstantial evidence of a discriminatory motive in making

those decisions. You should determine the weight and relevance of isolated remarks only by considering the totality of the circumstances.

If you have answered this and the first question yes, then you have rendered a verdict for the plaintiff on these claims and should not answer the next question.

If you have answered this question no, you have rendered a verdict for the defendant and should not answer the remaining question. If you have answered the first question no and this question yes, proceed to the next question.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES D. KIM,	:	
Plaintiff,	:	
-v-	:	96 CIV. 3327
	:	(DLC)
DIAL SERVICE INTERNATIONAL, INC.;	:	
DIAL SERVICE COMPANY, LTD.; and	:	
YURI KONNO,	:	
Defendants.	:	

TRIAL TRANSCRIPT (PARTIAL)

*****Page 339-348*****

A. These are for June entries, for June 30.

Q. Do you see the 88 Plaza Emporium?

A. I made that payment to this store, 276.52. And next to line is $106.79. All together this amount comes to $283.31. This is the expenses -

Q. Let me ask you the questions. It might be clearer. You paid Plaza Emporium 283.31, right?

A. Yes, right.

Q. And in what form did you pay them?

A. By cash.

Q. And where did you get that cash?

A. From the cash account.

Q. And what kind of store is the Plaza Emporium?

A. That is some kind of a of sundry store.

Q. Located where?

A. Located in Fort Lee.

Q. And what did you purchase for $283.31? What was the purpose of that purchase?

A. That was the two purposes. One is purchase sundries for Mr. Uetake who is arriving in New York on July I as the president of the company, so when he arrived in this town, his vacant house needed some kind of sundry items. So they are to purchase sundry items for him.

And next line is also Ms. Konno is expected to fly to New York. So usually we buy some sundries for Ms. Konno to not have any inconvenience for her.

Q. And by "sundries," what do you mean?

A. Sometimes tea, noodles, cup of noodles and the toilet papers and sometimes some kind of consumer items.

Q. And Plaza Emporium specializes in?

A. Yes, cheap store.

Q. Just so I'm clear, on the far left-hand corner, what date is listed in connection with the Plaza Emporium?

A. You mean July 7?

Q. Is that the date?

A. Yes. Is it July 7?

Q. I would like to show the witness Defendant Exhibit I for

identification -- that's the deposition -- I'm sorry. It is C for identification.

Can you tell the jury what Exhibit C for identification consists of?

A. Usually in this area most of the retail stores does not accept the check. Usually they ask -

MR. BERANBAUM: Your Honor, I hope I'm not being presumptuous. Let me repeat the question and try to get the answer to the question.

Q. Can you tell the jury what those documents consist of?

A. This one?

Q. All of those, all documents consisting of that exhibit.

A. This is a check from the operation account

Q. And there are many checks there, aren't there?

A. Yes.

Q. And those checks

THE COURT: Ask a leading question, counselor.

Q. These checks are from the operating account?

A. Yes.

Q. And those checks are signed by yourself?

A. Yes, I did.

MR. BERANBAUM: Your Honor, I offer those, Exhibit C into evidence at this time.

MR. GREEN: No objection.

THE COURT: C is received.

(Plaintiff Exhibit C received in evidence)

MR. BERANBAUM: And I think it would be helpful

if we did it now.

Q. Do you see a check there made out to Emporium?

A. Yes.

Q. And how the check made out for?

A. Check made out there for $283.31.

Q. Did you give that check, $283.31, to the Plaza Emporium?

A. No, I didn't.

Q. Could you explain what you did with that check?

A. First, I took a certain amount of money in order from this cash account to have a shopping for Mr. Uetake an Ms. Konno expecting coming just the beginning of July. So purchase with cash at that store, and I got the receipts of all of them.

THE COURT: Mr. Kim, I'm going to strike the answer.

The jury will disregard the answer.

You were asked what did you do with this check.

THE WITNESS: This check was deposited into cash account by cash.

Q. So it is correct that you converted that check into cash and returned it to the cash account?

A. Yes, right.

THE WITNESS: Now, I need the interpreter.

THE COURT: That is sufficient, Mr. Kim.

Q. Do you need the interpreter to understand my question?

THE COURT: There is no pending question. Place your next question, counsel.

MR. BERANBAUM; I do want to make -

THE COURT: Place your next question.

Q. And when you converted that check into cash, Mr. Kim, did you then deposit the exact same amount into the cash account?

A. Yes.

Q. And that is indicated in the $283,31, is that right?

A. Yes, right.

Q. Now, can you explain why you followed that procedure of converting this check made out to Plaza Emporium into cash and then depositing it into the cash account?

A. I took the cash from this, the cash account. in other words, to purchase certain items of sundry in the end of June. So after I made a shopping, I got a certain number of receipts from the store and then. after this account is basically used for pay account, not much using for other purpose, I have to return this money.

As you see here, the balance is short, so I have to return this money, so that I made a check exactly same amount for the receipt and then made a cash deposit and returned to this account just game amount.

Q. When you converted the check that's before you to pay out to Plaza Emporium, did you keep any of it for yourself?

A. This one?

Q. Yes.

A. (Through the interpreter) No, I didn't.

Q. Let me go to another example right above it.

You see -- and I might be mispronouncing Yomiuri America? Do you see that notation? Do you see Yomiuri America?

A. That is one of the big newspaper companies in New York. And to what population is it directed?

Q. And to what population is it directed?

A. In Japan, they distribute this newspaper more than six million copies, I think.

Q. And did DSI regularly do business with Yomiuri America?

A. We just put our telephone counseling service, advertise for telephone counseling service in that paper regularly.

Q. Can you explain to the jury how it is that $320 was deposited in the cash account associated with a notation Yomiuri America?

A. This is the amount for using for the employee who working for this advertisement so that this is expenses for the advertisement.

Q. And was there a practice that was followed whereby you would make out checks payable to third parties, convert them into cash and then deposit the cash into the cash account?

A. (Through the interpreter) Yes. I deposit the cash into the cash account.

Q. Where did this idea come from to make out a check to a third-party, convert it into cash and then deposit the

proceeds, the cash, into the DSI cash account?

A. The first idea when I start, Hashizume ordered me, by the name of Charlotte Kim -- at the time, there only 23 employees not with working visa so that only Charlotte Kim's check is available to cover for the payroll.

But, later on, a number of the illegal employees was increased so it is not fully covered, such kind of employee, so, as you see, even this page, from time to time shortages happen.

Q. From time to time shortages happens?

A. Yes, from time to time.

So I regularly made this kind of report to the head office, Mr. Sato. And Mr. Sato said, "If you are not covered, you must think of some way.

My answer is always, "Let us stop this kind of transaction as soon as possible."

But he said, sooner or later, they are going to use that, using some kind of refund to cover this kind of payroll.

MR. GREEN:. objection, your Honor. Not responsive.

THE COURT: Overruled.

Q. Did Mr. Uetake know about this practice?

A. Yes, he know.

MR. GREEN: Objection, your Honor. He has taken the Fifth Amendment and he cannot answer that question now.

THE COURT: Mr. Green, no speaking objection. Overruled.

The jury will disregard comments of counsel. Thank you.

Q. Did you discuss this practice with Ms. Konno when she came and conducted the audit on August 17, 1993?

A. Yes, I did.

Q. And tell me what the discussion consisted of.

A. As I told earlier time, I had audit from 9 a.m. to 1 p.m., long time. And then at the time I explained the more detail and accurately. And she said she apologize for me not complaining that I should handle this kind of complicated matters.

Q. And did you show her at this audit every single check that had been converted into cash and redeposited into the cash account?

A. Yes, I did.

Q. At this audit, did Ms. Konno what was Ms. Konno's response to you informing her of this practice?

THE COURT: Asked and answered, counsel. Next question.

Q. Mr. Kim, first of all, did you retain a portion of the cash account ledger sheet?

A. I don't have it.

Q. Did you not destroy a portion of the cash account ledger sheet?

A. I made a copy, only one portion, covering Mr. Uetake's

working time, and other things I destroy.

Q. And you gave that portion to Mr. Uetake?

A. Yes.

Q. And does Exhibit 123 consist of that portion that you retained and gave to Mr. Uetake?

A. Yes.

Q. I would like to show you Plaintiff Exhibit 22 for identification.

First of all, what is this document?

A. This is a letter sent by Ms. Konno, as you see her signature is underneath here, addressed to Kim, me.

MR. BERANBAUM: Your Honor, I offer this into evidence.

MR. GREEN: No objection, your

THE COURT: 22 is received.

(Plaintiff Exhibit 22 received in evidence)

Q. I refer you to this Roman numeral 2, paragraph 1, Roman. Does Ms. Konno make reference to the practice of making out checks to third parties who did not actually receive the check?

A. Yes.

Q. And where in paragraph 2 does she make reference to that?

A. Last sentence by this original copies, No. 2, line third, and postscripts.

Q. In English, are you referring to: "However, I understand your consideration and concern and I made the Tokyo side understand this very well, however, please draw checks to an

actual payee from now on"?

A. Yes, right.

Q. Is that what you are referring to?

A. Yes, right.

Q. Mr. Kim, we have talked in the past about the issue of your wife being on the payroll.

Did you ever make a formal objection to this practice?

A. Yes, I did.

MR. BERANBAUM: I would like to show the witness Exhibit 126.

THE COURT: Place your question, counsel.

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(In open court; jury not present)

THE COURT: Counsel, do you need me for anything?

MR. GREEN: Your Honor, I did want to note the basis for my objection. I apologize for it having been a speaking objection, but specifically, at his deposition, Mr. Kim was asked, did Mr. Uetake know that you were endorsing checks made out to other payees, and he was instructed to take the Fifth Amendment, and he did.

THE COURT: What page are you at?

MR. GREEN: 351, your Honor.

THE COURT: I believe that has to do with endorsing checks, no making them payable. Let me look directly at the testimony. Yes, at line 2 on page 351, the question was:

"Q. Did Mr. Uetake know that you were endorsing

checks made out to other payees?"

Again, we discussed this before. I am happy to look at any other excerpts that you want to direct my attention to, Mr. Green, specifically, but it seems to me that the line that was drawn, insofar as I could discern it from the attachments to the defendant's supplemental pretrial memorandum of law and motion in limine, was that the Fifth Amendment was taken as to the endorsements on the back of the checks and the actual payments, or transfer of cash, to the, quote/unquote, illegal workers. And it was not taken with respect to someone like Mr. Uetake's knowledge about the use of the cash account, the writing of such checks, the existence of this whole practice or procedure. And therefore I permitted the answer to be given.

MR. GREEN: Thank you, your Honor.

THE COURT: Thank you.

(Recess)

395-396

THE COURT: Do any members of the jury want to take a break back to the jury room at this point? I see that we are losing members of the trial team.

We're not going to wait for you, counsel. Make your decision.

MR. BERANBAUM: OK. I'll be quick.

(Pause)

THE COURT: Please proceed.

MR. GREEN: Thank you, your Honor.

THE COURT: Will everyone please be seated in the courtroom.

I'm sorry, sir. Would you please be seated. Thank you.

CROSS-EXAMINATION

BY MR. GREEN:

Q. Mr. Kim, before this trial began, you had testimony taken by way of a deposition. Do you recall that?

A. Yes, I do.

Q. Specifically, on the 26th of April of this year, you were deposed, and I ask if you can remember giving the following answer to the following question while you were under oath, at page 351, line 2. The question:

"Q. Did Mr. Uetake know that you were endorsing checks made out to other payees?"

By Mr. Beranbaum, your counsel: "I am directing the witness not to answer the question pursuant to the Fifth Amendment."

MR. BERANBAUM: Objection, your Honor. Can have --

THE COURT: Overruled.

MR. BERANBAUM: -- have a sidebar?

THE COURT: No.

Q. Do you recall that question and that response on your behalf at your deposition?

A. (Through interpreter) I don't really understand the

question. Well, if you can make each sentence short, maybe I can understand.

THE COURT: Counsel, can we give a copy of the deposition transcript to the interpreter. It may assist her in following along as you are reading.

MR. GREEN: Fine, your Honor.

THE COURT: Thank you.

Mr. Green, would you please re-place your question to the witness.

Q. "Q. Did Mr. Uetake know that you were endorsing checks made out to other payees?"

Response by Mr. Beranbaum, your counsel: "I am directing the witness not to answer the question pursuant to the Fifth Amendment."

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A. (Through interpreter) I must have sent ledger or other materials, but I don't think I ever sent them the canceled checks.

(In English) But in each stage I did it.

Q. There were times, were there not, as you told us this afternoon, when you wrote out checks to payees and then you took that check, deposited that check in your wife's account, and converted it to cash. Correct?

A. Of course the checks that was made to Charlotte Kim we did -- did it that way.

Q. I'm not asking about any checks made payable to your

wife. Did you, for example, make out checks payable to Mr. Lee, your accountant, sign his name on the back of that check, and deposit it in your own account with your wife and take the cash?

MR. BERANBAUM: Objection. I direct the client not to answer pursuant to the Fifth Amendment.

THE COURT: OK. Ladies and gentlemen, you have heard that, at his deposition, Mr. Kim's lawyer had advised Mr. Kim not to answer a question because of the Fifth Amendment, and now you have heard a similar instruction here during the course of Mr. Kim's cross examination. Of course the Fifth Amendment of the United States Constitution affords every person the right to decline to answer any question if he believes that the answers may tend to

403-404

THE COURT: You may read it.

(Record read)

A. (Through interpreter) Yes, of course.

Q. And in determining how much DSI spent in any given year on outside accountants and lawyers, did you take all the canceled checks made payable to outside accountants and lawyers and add them up?

A. (Through interpreter) Basically, that's what we do.

Q. So if among the canceled checks were checks made payable to outside lawyers and accountants which were never given to them, then these numbers would

be inaccurate to that extent, correct?

A. (Through interpreter) But there shouldn't be any or hardly any incidents where those -- such checks were unpaid to outside services.

Q. Is it your testimony, Mr. Kim, that during the period 1989 through 1995, you did not make any checks payable from DSI to outside lawyers or accountants and cash them without giving the money to those payees?

A. (Through interpreter) Yes, we cashed those checks, but we used those cash to re -.-- we apply those cash to -- towards such services.

Q. Is it your testimony that if you made a check payable to outside accountants, as the payee, you would endorse their name,-.. cash the check, and then pay them in cash?

MR. BERANBAUM: Objection. Fifth Amendment.

THE COURT: I give you the same instruction, ladies and gentlemen, with respect to the invocation of the Fifth Amendment or the instruction not to answer based on the Fifth Amendment.

MR. BERANBAUM: I also want to object that it is a compound question.

THE COURT: Yes.

Q. Mr. Kim, you testified a short time ago that there were subsidies being received by DSI from DSC. Can you tell us when those subsidies began?

THE COURT: Do you understand the question, Mr.

Kim?

THE WITNESS: No, I need to have -- (Pause)

A. (Through interpreter) Yes.

Q. When did DSC first begin sending subsidies to DSI in the U.S.?

A. I don't understand what "subsidy" means or "subsidy." It's the means of limiting?

Q. I believe you testified that you advised DSC, I believe in 1994 --

A. Yes.

Q. -- that they would not have to send a subsidy for

481-484

A. Yes, right.

Q. From that point on, in 1991, did you write checks from time to time to vendors and endorse them?

THE COURT: I am going to again ask you to break down that question, counsel.

Q. Did you from time to time make checks out to vendors or suppliers to the company?

A. Yes.

Q. And did you from time to time sign the names of the payees on the back of the checks?

MR. BERANBAUM: Objection. I direct the client not to answer the question pursuant to the Fifth Amendment.

THE COURT: I remind you of the instruction I gave you yesterday, ladies and gentlemen.

Q. You told us yesterday that Mr. Lee, who had been your accountant and then replaced Mr. Ito as DSI's accountant, was replaced by another accountant at the direction of Mr. Hashizume; is that right?

A. Yes, right.

Q. There came a time when you replaced that accountant, Mr. Awoki, once again with Mr. Lee; didn't there come such a time?

A. Yes.

Q. After Mr. Lee was once again the accountant for DSI, you worked with him directly?

A. Yes.

Q. And once Mr. Lee became the accountant for DSI, did you write checks to him from time to time?

A. Yes.

Q. Did you from time to time sign his name?

MR. BERANBAUM: Once again I direct the client not to answer pursuant to the Fifth Amendment.

Q. Mr. Kim, I show you a copy of what we have marked as Exhibit D. These are a series of checks drawn against Dial Service International, Inc. Is that your signature on the front of the check on behalf of Dial Service, Inc., each check?

A. Yes.

Q. Did you write these checks on behalf of Dial Service international, Inc.?

A. Pardon?

Q. Did you write these checks, make these checks out?

A. (Pause) Yes.

MR. GREEN: For the record, they are check nos. 828, 887, 939, 1155, 1801, and 1960. Your Honor, I move RR their introduction into evidence at this time.

MR. BERANBAUM: Your Honor, we only have three of those.

MR. GREEN: I'm sorry.

THE COURT: D is received.

(Defendant's Exhibit D received in evidence)

Q. Mr. Kim, in this Exhibit D, there were checks made out to Mr. Lee, CPA. Is that the same Mr. Lee who was your personal accountant and the accountant for DSI?

A. Yes, sir.

Q. In this exhibit, there were checks made out to Mr. Lee in the amount of $650, $700, another check for $650. Did you endorse those checks, payable to Mr. Lee?

MR. BERANBAUM: I direct the client not to answer pursuant to the Fifth Amendment.

Q. Mr. Kim, did you deposit the proceeds from those checks into the bank account you maintained with your wife in New Jersey?

A. For the deposit and the cashing

Q. Please answer yes or no if you can.

A. Yes.

Q. Did you give the cash from those checks to Mr. Lee?

A. No. Transferred to the DSI cash account, refunded.

Q. At the time of these transactions, in Exhibit D, did you have the authority to write a check simply payable to cash and cash the check?

A. Yes, I had.

Q. With respect to the checks that are made out to Crimson & Brown Associates for $280 and $350, did you endorse those checks?

MR. BERANBAUM: I direct the client not to answer pursuant to the Fifth Amendment.

THE COURT: That is check 1801?

MR. GREEN: That would be check 887, your Honor and 1801.

Q. Mr. Kim, did you give the cash proceeds from those checks payable to Crimson & Brown in fact to Crimson & Brown?

A. The recommended -

Q. Please answer yes or no if you can.

A. Yes. Paid -

Q. You gave them that cash?

A. To that employee.

Q. I'm sorry -

THE COURT: To the employee of Crimson & Brown?

THE WITNESS: To be used the person, by Crimson Brown.

Q. Did you take the cash from those checks and give that cash to an employee of Crimson & Brown?

A. Not employed. This other person handled the translation, legal translation problem to -- for the problem of the Susan Shians case belonging to Ms. Konno.

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Q. In any discussions with Ms. Konno on the 17th of August, did you tell Ms. Konno that you were signing the names of payees to checks and cashing them? Did you say that to Ms. Konno?

A. No, I did it.

Q. No, you did not?

A. Yes, I did it.

Q. Is it your testimony that you told Ms. Konno on the 17th of August that you were signing other people's names who were payees on checks and cashing those checks?

MR. BERANBAUM: I would direct the client not to answer, Fifth Amendment.

THE COURT: With respect to whether he told Ms. Konno?

MR. BERANBAUM: on the issue of endorsing the checks.

Maybe the court reporter needs to read back the question.

APPENDIX C

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
JAN 12 1999
OFFICE OF THE CLERK

No. 98-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DIAL SERVICE INTERNATIONAL, INC.,
DIAL SERVICE COMPANY, LTD.
and YURI KONNO,

Petitioners,

vs.

CHARLES D. KIM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari represents the fourth, and, it is expected, final attempt by petitioners Dial Service Company, Ltd. ("DSC"), a Japanese company, Dial Service International, Inc. ("DSI"), its New York subsidiary, and Yuri Konno ("Konno"), the owner of the two companies (collectively "petitioners"), to overturn the jury's determination that they discriminated against and fired respondent Charles D. Kim ("respondent" or "Kim") because of his Korean race.[1]

In this petition, petitioners make the same factbound arguments, dressed up to give an appearance of legal moment, that were properly and repeatedly rejected by the jury and lower courts. Furthermore, petitioners' sweeping assertions of conflicts among the Court of Appeals on these issues are grossly exaggerated. Finally, petitioners' arguments on both the mixed motives charge and the Fifth Amendment were waived below. In sum, there is no sound basis for the Court to review this case and the petition should be denied.

A. The Petition Misrepresents the Evidence of Discrimination Warranting a Mixed Motives Jury Instruction.

Petitioners misrepresent the evidence of discrimination that the lower courts considered in approving a mixed motives jury instruction. The petition reads as if the record below contained only a single item of evidence that demonstrated bias, the Fort Lee memorandum, whereas, in fact, there is extensive evidence

---

1. Previously, petitioners unsuccessfully filed post-trial motions for judgment as a matter of law and new trial with the United States District Court (Apdx B-13); an appeal of the District Court judgment to the Court of Appeals for the Second Circuit (Apdx A-1); and a petition for *rehearing in banc* (Apdx A-11).

directly reflecting petitioners' anti-Korean animus. Moreover, petitioners' description of the Fort Lee memorandum is unreliable.

Petitioners do not dispute that the memorandum authored by DSC General Manager Shohei Ito reflects the anti-Korean attitudes of a high level company official. Rather, petitioners argue that the memorandum is without import because Ito had "no responsibility for any of the employment decisions challenged by Kim as discriminatory conduct." (Pet. 3) This statement is simply not true. The Second Circuit and the District Court both determined that evidence "was adduced at trial that tended to show that Ito was a 'decisionmaker' for purposes of the actions upon which plaintiff's claims of discrimination are based." (Apdx A-9)[2]

---

2. The District Court, in overruling petitioners' objection to the admission of the Ito memorandum and Konno's cover letter forwarding the memorandum, stated:

> I am conscious of the fact that this [Ito's memorandum] was prepared by a high-level executive [Ito], that is, the second document [Konno's cover letter], and sent by another high level executive [Konno], who is also a defendant individually in this case, and asks for a response in the context of normal business functions.
>
> *Both of these individuals, Ms. Konno and Mr. Ito, made decisions and executed decisions regarding the plaintiff's employment during the time that he was working for DSI,* and therefore it is highly relevant and under [Fed. R. Civ. P.] 403 I believe that it is appropriate to receive the document.

(Transcript ("Tr.") 297) (emphasis added).

Petitioners also misleadingly suggest that Konno's sole involvement with the memorandum was receiving it from Ito. This is not true. As both lower courts specifically found, Konno, upon receiving the racially tainted memorandum, forwarded it without qualification to the President of DSI for his consideration. (Apdx A-9; Tr. 297) Konno's actions lent legitimacy to the racist viewpoints set forth in the memorandum, and showed, at the very least, that she tolerated such prejudice.

As noted by the Second Circuit in its Summary Order (Apdx A-9), the Fort Lee memorandum was one of a number of evidentiary items directly reflecting DSC officials' prejudice against Koreans. Those other items, missing from petitioners' discussion, include:

- Seven months before she fired Kim, Konno issued a ban on DSI's use of Korean vendors. She declared, "Don't use Korean limousine service. Don't use Korean attorney. Don't use Korean CPA. . . . This is a Japanese company and we have to use Japanese people." (Joint Appendix ("JA") A-143) In furtherance of this policy, DSI stopped using a car service because it had Korean drivers[3], DSI fired the Korean Kim, and immediately thereafter, DSI replaced a Korean accountant, about whom no one had complained, with a Japanese accountant.

- A high level DSC official opposed using Kim's choice for an accountant solely because the accountant was Korean. Mr. Uetake, the former president of DSI, testified that DSC's head of accounting told him, "Well, Mr. Kim is Korean. So he [the head of

3. Konno had complained that the Korean drivers smelled like kimshi, a traditional Korean food with a garlicky taste.

accounting] ask me strongly not to use a Korean accountant." (JA A-240)

- Konno showed distaste for Kim's speaking Korean at DSI's office. Konno testified at her deposition that nearly all of DSI's Japanese employees had complained about Kim speaking Korean at the office, and that they found his use of Korean "unpleasant" and that it made them "uneasy." (JA at 444-52) The record shows Konno's testimony to be fabricated. None of the DSI employees who testified at trial, including those Konno identified as having made complaints, stated that they had complained about Kim speaking Korean. Konno's false testimony reflected her own prejudices and fears about Koreans.

- Petitioners treated Kim in a disparate manner from similarly situated non-Korean employees. Kim, as DSI's vice president and treasurer in charge of finance, accounting, general affairs and personnel, was paid significantly less than all other DSI vice-presidents, each of whom was Japanese. Kim was paid $53,000 a year and did not receive a raise for five years. By contrast, during the same five year period, DSI's three Japanese vice presidents earned annual salaries of $85,000, $60,000 and $60,000 respectively, and lower level Japanese employees received raises.

Kim also proved that the reasons petitioners gave at trial for his discharge were false and a pretext for discrimination. President Konno, defendants' spokesperson at trial, testified that she fired Kim for financial and work performance reasons. The sum total of Konno's testimony was:

Q. . . . Ms. Konno, would you tell the jury why you fired Mr. Charles Kim.

A. The most important reason, the main reason was economic reason.

Q. Were there other reasons also?

A. I'm not satisfied with his performance.

(JA A-275) Konno offered no further explanation or supporting evidence for her conclusory statements.

By contrast, Kim presented detailed evidence showing Konno's explanation to be false. As to the purported financial necessity of Kim's removal, the evidence pointed in the exact opposite direction. For the two years leading up to his discharge, 1994 and 1995, Kim, then DSI's sole officer, was instrumental in turning a profit for the company for the first time in its history. In addition, whereas petitioners failed to produce evidence of Kim's allegedly inadequate work performance, Mr. Uetake, former DSI president, testified that Kim's job performance was "excellent." (JA A-244) Kim put in longer hours than anyone else at DSI; assumed numerous job responsibilities outside of his formal job description; improved DSI's finances; was liked and respected by his co-workers; and received commendations for his dedication and work. (JA A-133-42; 223-25)

The District Court's post-trial order succinctly summarized the evidence:

> The jury could find, based on the evidence, that the defendants discriminated against the plaintiff throughout his employment: by hiring him at a salary below what a Japanese employee would have been

> paid and by firing him when they would not have fired a Japanese employee. Ms. Konno's testimony about her reasons for firing the plaintiff were so brief and conclusory that they were almost cryptic. Indeed, the defendants did not develop their argument that they terminated the plaintiff's employment due to their own economic exigencies or the plaintiff's poor performance. *As a result, the jury was justified in believing that racial animus informed decisions about the plaintiff's employment at every step.*

(Apdx B-36) (emphasis added).

B. The Petition Misrepresents The Facts Surrounding the Fifth Amendment Issue.

Petitioners' discussion of the facts surrounding the Fifth Amendment issue is incomplete and misleading. Petitioners' charge that Kim, by refusing to answer seven questions at trial on Fifth Amendment grounds, deprived them of an opportunity to develop their unclean hands or "after acquired evidence" defense [4] is unsupported by the record and conflicts with the District Court's finding.

At his deposition, Kim fully answered questions about petitioners' irregular accounting practices, and his role in the operation. Among other things, Kim testified about DSI's

---

4. The District Court's Opinion and Order fairly summarized the evidence concerning petitioners' unclean hands or after-acquired evidence defense that Kim had allegedly defrauded the company. (*See* Apdx B-24-25) The jury was instructed on petitioners' unclean hands defense, but, as indicated by their verdict for respondent in excess of $1.5 million, rejected it.

practice of converting checks made out to third parties into cash, depositing the checks into a cash account and paying vendors and undocumented Japanese employees with proceeds from the cash account. At his deposition, Kim asserted the Fifth Amendment only when asked whether he had forged endorsements on certain checks.

On the basis of Kim's limited invocation of the Fifth Amendment at his deposition, petitioners, in a pretrial motion *in limine*, sought to preclude him from offering any testimony whatsoever that would dispute petitioners' accusation that Kim had defrauded the company. When at trial, Kim testified that DSC and DSI officials authorized the questionable accounting practices, petitioners renewed their objection.

The District Court denied petitioners' request, explaining that Kim's assertion of the Fifth Amendment at his deposition was confined to specific questions about his endorsement of checks:

> [I]t seems to me that the line that was drawn, insofar as I could discern it from the attachments to the defendant's supplemental pretrial memorandum of law and motion in limine, was that the Fifth Amendment was taken as to endorsements on the back of checks and the actual payments, or transfer of cash, to the quote/unquote, illegal workers. And it was not taken with respect to someone like [DSI President] Mr. Uetake's knowledge about the use of the cash account, the writing of such checks, the existence of this whole practice or procedure.

(JA A-153-54) Thus, the court permitted Kim to testify as to the defendants' knowledge of the irregular accounting practices.

Kim was subjected to an exhaustive cross-examination (*see* Tr. 395-646), much of it devoted to trying to show that Kim had defrauded petitioners. With the exception of seven questions, Kim answered all of petitioners' questions. As to the seven questions, Kim narrowly invoked the Fifth Amendment when asked whether he had forged endorsements on checks. (JA A-166-68; 188-91; 209) At the trial, petitioners did not object to Kim's assertion of the Fifth Amendment, and specifically did not contend that Kim had waived the privilege by testifying on direct examination about the same subject matter. (*Id.*) After each invocation of the privilege, the District Court instructed the jury that they could draw an adverse inference. (*Id.*) In its charge to the jury, the District Court reiterated the adverse inference instruction. (Apdx B 48-49, n.8) Petitioners did not object to the adverse inference instruction during the cross-examination or at the charging conference.

REASONS FOR DENYING THE WRIT

I.

THE FIRST QUESTION PRESENTED WAS NOT PRESERVED BELOW.

Petitioner failed to preserve for appeal the question whether there was sufficient evidence of discrimination to warrant a mixed motives charge. A party who fails to object to a jury instruction at trial waives the right to make the instruction the basis for an appeal. Fed. R. Civ. P. 51; *Springfield Massachusetts v. Kibbe*, 480 U.S. 257, 258 (1987). This rule is designed to allow a trial court to have an adequate opportunity to cure any defects in the instructions before sending the jury to deliberate. *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992), *cert. denied*, 508 U.S. 592 (1993) (citing 9 C.

Wright & A. Miller, Federal Practice and Procedure § 2551 (1971), at 623); *Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1068-69 (1st Cir. 1990).

In this case, the parties were provided two opportunities to take exceptions to the jury charge, once on the fifth day of trial at the close of all the evidence, and again on the morning of the sixth day of trial before the jury was charged. On both of these occasions, defense counsel used the opportunity to raise exceptions with the court. At no time, however, did defense counsel object to the inclusion of a mixed motives charge. Therefore this objection was waived.

The only objection made by petitioners to the mixed motives charge was contained in their Response to Plaintiff's Pretrial Memorandum of Law. However, petitioners' pretrial memorandum, submitted before the District Court had an opportunity to consider the evidence of discrimination adduced at the trial, did not cure their failure to make a timely objection. *See Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1373 (9th Cir. 1979) (" 'The trial court is not required to rummage through trial briefs and proposed instructions in an effort to discover potential objections to instructions not yet given or formulated' ") (quoting *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 572 (9th Cir. 1960)); *Caruso v. Forslund*, 47 F.3d 27, 31 (2d Cir. 1995) (plaintiff could not circumvent Fed. R. Civ. P. 51 by relying on her pretrial submission of proposed jury instructions).

A timely objection at trial would not have been futile. Prior to the commencement of the trial, the District Court had not ruled on petitioners' mixed motives objection set forth in their Pretrial Memorandum of Law. In the absence of a categorical ruling rejecting petitioners' pre-trial position on the mixed motives charge, there is no reason to believe a trial objection would have been a mere formality. *See Fogarty v. Near North*

Ins. Brokerage, Inc., 1998 U.S. App. LEXIS 30519 (2d Cir. December 1, 1998) (unless court's rejection of prior objection to jury instruction is sufficiently categorical, party must object at trial to preserve issue for appeal); *cf. Ginett v. Computer Task Group, Inc.*, 11 F.3d 359, 360 (2d Cir. 1993) (trial objection to jury instruction unnecessary to preserve issue for appeal where court had "flatly rejected" plaintiff's proposition set forth in a motion *in limine*).[5]

II.

PETITIONERS DID NOT PRESERVE THE SECOND QUESTION FOR APPEAL.

The petition's second proposed question, regarding Kim's Fifth Amendment rights, was not considered by the Second Circuit. Specifically, petitioners are challenging District Court rulings that they never appealed to the Court of Appeals. Therefore, the petitioners' proposed second question was not preserved for appeal.

Petitioners' proposed question consists of challenges to three separate District Court rulings. Petitioners contend that: one, the District Court abused its discretion by allowing Kim to testify on direct examination concerning a matter that he allegedly refused to testify about on Fifth Amendment grounds at his deposition; two, the District Court abused its discretion by allowing Kim to invoke the Fifth Amendment on cross-examination about matters that he had allegedly testified about on direct examination; and three, the District Court abused its discretion by issuing an adverse inference instruction as a remedy for Kim's refusal on cross-examination to answer the questions on Fifth Amendment grounds, rather than imposing a stricter sanction. (*See* Pet. 25)

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5. In fact, the District Court modified other proposed instructions in response to petitioners' objections. (*See, e.g.*, Tr. 925-26; 995 (burden of proof in pretext charge))

However, petitioners' Statement of Issue submitted to the Second Circuit was significantly narrower than the question presented to this Court:

> Whether the district court committed reversible error by allowing plaintiff to testify concerning matters about which he could not be cross-examined because he invoked the Fifth Amendment?

(Brief For Appellants Dial Service International, Inc., Dial Service Company, Ltd. and Yuri Konno at 2) The point heading in petitioners' Second Circuit brief similarly reads:

> The District Court Committed Reversible Error By Permitting Kim To Invoke The Fifth Amendment As a Shield To Prevent Cross-Examination On Matters Similar To Those He Brought Out On Direct Examination

(*Id.* at 59)[6]

Thus, the issue considered by the Court of Appeals was confined to the second prong of the question now presented to this Court. The appeal below did not include a challenge to the District Court's decision to allow Kim to testify on direct

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6. In the text of their Second Circuit brief, petitioners likewise limited their challenge to the District Court's decision allowing Kim to invoke the Fifth Amendment on cross-examination:

> The district court committed reversible error by permitting Kim to invoke the Fifth Amendment on cross-examination after he testified on direct examination as to defendants' alleged knowledge of the fraudulently endorsed check.

(*Id.* at 61).

examination concerning a matter about which he allegedly refused to testify at his deposition. Petitioners also did not argue to the Second Circuit, as they wish to argue to this Court, that the District Court erred in not imposing a sanction more severe than an adverse inference instruction. The Court should decline to review a question not raised before the Court of Appeals. *See Kibbe*, 480 U.S. at 258.

As to the one issue actually presented to the Second Circuit, the propriety of Kim's invocation of the Fifth Amendment on cross-examination, that question also is not properly before the Court. As noted, petitioner never objected at trial to Kim's assertion of the privilege upon cross-examination. (*See supra* at p. 8) Petitioners never argued to the District Court that Kim waived his Fifth Amendment rights by testifying on direct. Thus, petitioners did not preserve the second proposed question for review because they failed to submit the question, in substantial part, to the Court of Appeals, and neglected to make a timely objection at trial to the only part of the question raised before the Second Circuit.

III.

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THAT THERE WAS SUFFICIENT EVIDENCE TO WARRANT A MIXED MOTIVES CHARGE.

Notwithstanding petitioners' failure to make a timely objection to the mixed motives charge, the Court of Appeals considered the question and held that the District Court did not err in issuing the instruction:

> [W]e do not believe that the court erred in issuing a "mixed motives" instruction. Such an instruction is warranted where, *inter alia*, there is "evidence of statements or actions by decisionmakers that may be viewed as directly reflecting the alleged

> discriminatory attitude." *Raskin v. Wyatt Co.*, 125 F.3d 55, 60-61 (2d Cir. 1997) (internal quotation marks and citation omitted). Among the direct evidence presented in this case was a memorandum written by DSC General Manager Shohei Ito, and forwarded to the then-President of DSI by Konno, which made a disparaging remark about Koreans. Testimony was adduced at trial that tended to show that Ito was a "decisionmaker" for purposes of the actions upon which plaintiff's claims of discrimination are based. Under these circumstances, we cannot say that the court erred by giving a "mixed motives" instruction.

(Apdx A-9).

It is clear that under the standard articulated by the Second Circuit in this and other cases, *see, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997); *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F.2d 171, 182 (2d Cir. 1992), Kim presented sufficient evidence of discrimination (*see supra* at pp. 2-6) to justify a mixed motives charge. Petitioners do not dispute that Kim met the Second Circuit's mixed motives standard, but argue, in essence, that the standard is flawed. The Court should reject this argument. The standard employed by the Second Circuit is consistent with the approach followed by the majority of circuit courts interpreting *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In *Price Waterhouse*, the Court held that a plaintiff could prevail in a case in which the employer had lawful as well as unlawful motives for its actions, so long as the employer could not prove that it would have taken the same action if it had been motivated solely by lawful considerations. The plurality described the Court's holding:

> We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.

Id. at 258.

Under *Price Waterhouse*, the mixed motives analysis is applied only when the plaintiff proves the discrimination "played a motivating part in an employment decision." *Id.* The Court found that this requirement was satisfied by circumstantial evidence of discrimination presented by the plaintiff in that case, because the evidence was enough to "show that the employer actually relied on her gender in making its decision." *Id.* at 251.

The plurality did not refer expressly to "direct evidence" in discussing the quantum of evidence necessary to trigger the mixed motives analysis. However, in requiring that a plaintiff show that an impermissible motive played a "motivating part in an adverse employment decision," the plurality made clear that the evidence of discrimination must be more substantial than what is needed to make out a *prima facie* case under the pretext analysis. *Id.* at 250, 252, 258. Justice O'Connor's concurrence emphasized the strong degree of proof needed to shift the burden of persuasion to the defendant:

> . . . the plaintiff must show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status.

Id. at 277.

A majority of circuit courts, including the Second Circuit, have held that *Price Waterhouse* does not bar a plaintiff from using circumstantial or inferential evidence to shift the burden of persuasion; however, the evidence of discrimination must go beyond the simple *prima facie* showing needed to invoke *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998) (direct evidence, warranting a mixed motives charge, interpreted as conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to find that that attitude was more likely than not a motivating factor in the employer's decision); *Thomas v. National Football Players Ass'n*, 131 F.3d 198, 205 (D.C. Cir. 1997) (burden of persuasion shifts under *Price Waterhouse* when the plaintiff has shown any sufficiently probative direct or indirect evidence that unlawful discrimination was a substantial factor in the employment decision); *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997) (remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality); *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747, 750 (1st Cir. 1996) (stating that it was unnecessary to "essay fine distinctions" on the quantity of proof required to support a mixed motives analysis, adding that the shift in the burden of persuasion invariably depends upon a plaintiff's ability to produce evidence of the employer's discriminatory motive for the adverse job action beyond the *prima facie* showing needed to invoke *McDonnell Douglas*); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) (requiring evidence of conduct or statements both that reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision); *Griffiths v. CIGNA Corp.*, 988 F.2d 457,

470 (3d Cir. 1993) (circumstantial evidence is sufficient if it "ties directly to" discriminatory animus), *cert. denied*, 510 U.S. 865 (1993); *Ostrowski*, 968 F.2d at 182 (*Price Waterhouse* charge appropriate where plaintiff presents nonstatistical evidence directly tied to the forbidden animus, for example policy documents or statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus).

Walden v. Georgia-Pacific Corp., 126 F.3d 506 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1516 (1998), which petitioners contend is "identical" in pertinent respects to the instant case, is readily distinguishable. (Pet. 21-22) In *Walden*, the Third Circuit held that a memorandum reflecting a retaliatory animus did not trigger a mixed motives charge where there was no evidence linking its author to the decision to fire the plaintiff. At most, the plaintiff could show that the decisionmaker had received the memorandum. By contrast, in this case, there is a clear linkage between the prejudiced memorandum and the decisionmakers who fired Kim. As both lower courts observed, Ito, the author of the memorandum, was a decisionmaker. (*See supra* at p. 2) Moreover, unlike the *Walden* decisionmaker, Konno, by forwarding Ito's memorandum to DSI's President for his review, took actions that may be viewed as showing that she shared, or at least tolerated, Ito's anti-Korean sentiments. *See Barbano v. Madison Cty. Bd. of Supervisors*, 922 F.2d 139, 143-44 (2d Cir. 1990) (finding decisionmaker's knowing toleration of discriminatory statements by other officials to constitute evidence of discrimination).

Petitioners' claim that the circuit courts are in "glaring and untenable conflict" about *Price Waterhouse* (Pet. 19) is highly exaggerated. *See Thomas*, 131 F.3d at 204 (surveying the law of other circuits and finding that the majority of the circuits considering the mixed motives doctrine reached a similar

conclusion to the D.C. Circuit). As to the "multiple pleas" for guidance from the Court on this issue (Pet. 22-23), the petition cites exactly two student law review notes.

This would be a singularly poor case for the Court to select for clarifying any confusion in the *Price Waterhouse* standard. Kim presented strong evidence of discrimination, whether analyzed under the mixed motives or pretext method of proof. Kim proved that petitioners' explanation for his discharge was a sham. (*See supra* at pp. 5-6) Kim also presented compelling evidence of disparate treatment, such as a racially-based pay scale (*see supra* at p. 4), which while by itself may not have warranted a *Price Waterhouse* charge, in conjunction with other evidence of pretext and discrimination, would have satisfied his ultimate burden of persuasion under the pretext analysis. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Thus, the outcome of this case would have been unchanged had the District Court not given the mixed motives charge.

IV.

THE DISTRICT COURT'S ADVERSE INFERENCE INSTRUCTION PROPERLY ACCOMMODATED KIM'S FIFTH AMENDMENT RIGHTS WHILE PREVENTING UNFAIRNESS TO PETITIONERS.

The District Court did not abuse its discretion when, in response to respondent's invocation of the Fifth Amendment, it gave the jury an adverse inference instruction, rather than imposing a more drastic sanction. The District Court's remedy fairly balanced Kim's privilege against self-incrimination and petitioners' interest in presenting evidence in support of their case.

Petitioners' suggestion that there is confusion or conflict among the lower courts regarding this area of the law is dubious.

The law regarding a witness' invocation of the Fifth Amendment in a civil case is well settled. The Fifth Amendment "guarantees . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and *to suffer no penalty . . . for such silence.*" *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (underlining added; italics in original; citation omitted). Thus, the Supreme Court has prohibited "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' " *Id.*; *see also Gardner v. Broderick*, 392 U.S. 273, 278 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968); *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973).

"Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir. 1994). Further, the court "should seek out those ways that further the goal of permitting as much testimony as possible to be presented in the civil litigation, despite the assertion of the privilege." *United States v. Certain Real Property and Premises Known As: 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3d 78, 84 (2d Cir. 1995).

The District Court has broad discretion to fashion a remedy to avert prejudice to the party that may result from the opposing party's invocation of the Fifth Amendment. *Certain Real Property*, 55 F.3d at 84-85. So long as the trial court considers relevant factors and acts with moderation to accommodate both a litigant's valid Fifth Amendment interests and the fairness interests of the opposing party, the nature and extent of that accommodation should be left primarily to the District Court's discretion. *See id.*; *United States v. United States Currency*, 626 F.2d 11, 16 (1st Cir. 1980) (stating that the district court is in a better position to know what means will best accommodate

all interests); *Wehling v. Columbia Broadcasting Syst.*, 608 F.2d 1084 (5th Cir. 1979).

Petitioners' argument that the District Court abused its discretion in not imposing a more serious sanction than an adverse inference instruction is premised on the false proposition that Kim abused the Fifth Amendment. The lower courts never found that Kim abused the discovery process or the Fifth Amendment. In the absence of a finding of abuse by the lower courts, petitioners are left hoping that this Court will embark on its own fact-finding — an unlikely outcome.

Defendants' further argument that Kim invoked the Fifth Amendment on cross-examination about the same issue to which he testified on direct examination also is erroneous. (Pet. 26) On cross-examination, Kim declined to testify about the narrow question of whether he forged certain check endorsements. However, he did not testify about these endorsements in his direct testimony. During defendants' cross-examination, Kim did not invoke the Fifth Amendment regarding any other issue and answered all other questions about his involvement in DSC's and DSI's irregular accounting practices.

The District Court's adverse inference instruction properly accommodated both parties' interests. Since the jury was instructed that it could draw an adverse inference from Kim's refusal to answer petitioners' questions about the check endorsements, it is difficult to decipher how petitioners were prejudiced by the court's ruling. Petitioners were not precluded from presenting other evidence that check endorsements were forged, if such evidence existed. Petitioners were not precluded from arguing to the jury that the check endorsements were forged. Moreover, petitioners were not precluded from presenting evidence that the irregular accounting practices were unauthorized; indeed President Konno testified to that effect. Petitioners cannot explain how they were

prejudiced by the court's ruling except that they were unable to extract an admission from Kim on the narrow question of sixteen check endorsements. Thus, petitioners' claim that the court's ruling was an abuse of discretion is thoroughly unsupported.

The cases cited by petitioners on this issue are factually so far afield from the instant case that they are not instructive. For instance, in the two First Circuit cases discussed in the petition, *Serafino v. Hasbro, Inc.*, 82 F.3d 515 (1st Cir. 1996), and *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), the District Court struck the witnesses' trial testimony because, at their depositions, they asserted the Fifth Amendment over a wide range of matters, preventing the opposing party from carrying out an effective investigation of their case. Here, by contrast, Kim at his deposition invoked the Fifth Amendment regarding a single narrow question. In *Serafino* and *Cartagena*, the district courts determined that the witnesses' assertion of the privilege impaired the opposing parties' ability to put on their case; here, the District Court made no such finding.

In sum, the District Court properly exercised its discretion when it allowed Kim to assert the privilege and gave an adverse inference instruction, and petitioners have failed to show good cause for disturbing the decision.

CONCLUSION

There is no basis for this Court to review the Second Circuit's decision. The petition should be denied.

Respectfully submitted,

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